TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 358.

HOMER E. GRAFTON, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

FILED AUGUST 3, 1906.

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INDEX.

	Original.	Print.
Caption	1	1
Proceedings in Court of First Instance	1	1
Complaint or information	1	1
Demurrer and special plea	2	2
Proceedings of general court-martial	4	4
Decision on demurrer and plea	8	7
Plea of not guilty	10	8
Hearing	10	8
Testimony of Capt. C. H. Martin	11	9
Gen. William H. Carter	12	9
Mr. Ross	15	11
Ambrosio Arbidalla	16	12
R. M. Kirby Smith	27	20
Macario Orbe	30	22
Rafael Ycasama	34	25
Willis Lynch	36	26
Lieut. W. F. Harrell	40	30
Willis Lynch (recalled)	50	36
D. M. Falvey	51	37
Lieut. W. F. Harrell	52	38
Capt. G. H. Davis	69	49
Capt. F. S. Hutton	76	53
Santos Espinosa	79	55
F. D. Wicham	82	57
Sergt. E. Propst	83	58
Corpl. Jake Reiter	85	59
Corpl. C. A. Treadwell	91	63
Private Samuel Bennett	97	68
Sergt. Edward J. Little	100	69
Private Homer E. Grafton	101	70
Private Charles A. Faver	114	77
Defense rests	116	78
Testimony of Santos Espinosa	116	78
Martin Muller	117	79
Sergio Consing	118	80
Lieutenant Harrell (recalled)	121	82

Proceedings in Court of First Instance—Continued.

	Original.	Print.
Hearing—Continued.		
Case closed	121	82
Stenographer's certificate	121	82
Decision	122	82
Notice of appeal	133	90
Assignment of error	135	90
Clerk's letter transmitting record	137	92
Record entries	137	92
Opinion	137	92
Dissenting opinion	147	98
Petition for writ of error	149	99
Assignments of error	150	100
Copy of writ of error	151	100
Order allowing writ of error	153	101
Copy of citation	154	102
Clerk's certificate	155	102

1 UNITED STATES OF AMERICA.

In the Supreme Court of the United States.

HOMER E. GRAFTON, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES, DEFENDANT IN ERROR. } In error to Supreme Court of the Philippine Islands.

Proceedings had in Court of First Instance of the province of Iloilo, Philippine Islands and the Supreme Court of the Philippine Islands.

THE UNITED STATES
vs.
HOMER E. GRAFTON.

Be it remembered that heretofore, to wit, on the 28th day of November, 1904, in the Court of First Instance of the province of Iloilo, came one Ruperto Mantinola, prosecuting attorney of the province of Iloilo, and filed in the clerk's office of said court an information or complaint signed by the aforesaid Ruperto Mantinola, prosecuting attorney, against Homer E. Grafton, which said information in words and figures following, to wit:

THE UNITED STATES
vs.
HOMER E. GRAFTON. } Complaint.

The subscriber accuses Homer E. Grafton of the crime of
2 assassination, committed in the manner following: That on the 24th of July, 1904, and in the barrio of Santo Rosario, within the jurisdiction of the municipality of Buena Vista, Guimaras Island, province of Iloilo, Philippine Islands, the said accused, with illegal intention and maliciously and without justification and with treachery and deliberate premeditation killed Felix Villanueva in the manner following: That on said day and in said barrio the said accused, Homer E. Grafton, with the rifle that he carried at the time, known as the United States magazine rifle c. .30, fired a shot directly at Felix Villanueva, causing with said shot a serious and necessarily fatal wound, and in consequence of said wound the aforesaid Felix Villanueva died immediately after the infliction thereof, in violation of the law.

Iloilo, P. I., November 28, 1904.

RUPERTO MANTINOLA,
Prosecuting Attorney.

Witnesses:

Gaudioso Palacios,
Macario Oro, } Residing at Santo Rosario.

Ambrosio Lucban,
Rafael Icasama, } Buena Vista.

W. Llynch, justice of the peace, Iloilo.

Afterwards, to wit, November 30th, 1904, the case was called for trial in the Court of 1st Instance for the province of Iloilo, 9th Judicial District, Philippine Islands, before his honor, Judge Henry C. Bates, and the accused interposed a demurrer to the jurisdiction of the court and also a special plea in bar, of former jeopardy, in words and figures following:

In the Court of First Instance for the province of Iloilo, island of Panay, Philippine Islands.

THE UNITED STATES
vs.
HOMER E. GRAFTON, PRIVATE
Co. "G," 12th U. S. Infantry.

The accused, Homer E. Grafton, demurs to the indictment upon the following grounds:

3 The Court of First Instance has no jurisdiction to try the accused for the offense alleged in the indictment for that the acts constituting the alleged offense were done and committed within the limits of Camp Jossman, a military reservation of the United States, and by a soldier duly enlisted in the Army of the United States, in the line of duty, all of which appears in the record of his former trial by a military court, duly convened by competent authority, and having exclusive jurisdiction of offenses committed within the limits of said reservation; and the order of the President of Sept. 1st, 1903, copies of the judgement of said court, and said order of the President are submitted herewith.

2. The Courts of First Instance of the Philippine Islands have no jurisdiction of the persons of officers or enlisted men of the United States Army for alleged offenses committed in the performance of military duty.

3. Courts of First Instance are not constitutional courts as contemplated by the 3rd Article of the Constitution of the United States, and hence are without jurisdiction to try causes of which the constitutional courts have exclusive jurisdiction.

4. The courts of the Philippine Islands can not deprive the accused of his constitutional privilege of trial by jury.

5. The accused denies the right of the court other than a military tribunal, constituted by the authority of the U. S., to try him upon an indictment which has not been found or presented by a grand jury.

4 6. If the court holds that it has jurisdiction in this case, the accused, as a special plea in bar of these proceedings, submits herewith a duly certified copy of the judgment of a general court-martial, duly convened by Special Orders, No. 152, dated Headquarters Department of the Visayas, Iloilo, Panay, Philippine Islands, August 1, 1904, at Camp Jossman, Guimaras, Philippine Islands, showing that he has heretofore been tried for and acquitted

of the identical offense alleged in the indictment, as by the record thereof more fully and at large appears, which said judgment still remains in full force and effect and not in the least reversed or made void.

HOMER E. GRAFTON.

Sworn to as to all facts set forth in the plea to the jurisdiction before me this Nov. 30, 1904.

CLARENCE S. NETTLES,
Capt. & Actg. Jdg. Adv., U. S. A.

CASE I.

Proceedings of a general court-martial which convened at Camp Jossman, Guimaras, P. I., pursuant to the following order:

HEADQUARTERS DEPARTMENT OF THE VISAYAS,
Iloilo, Panay, Philippine Islands, August 1st, 1904.

SPECIAL ORDERS, No. 152.

1. A general court-martial is hereby appointed to meet at Camp Jossman, Guimaras, at 10 o'clock a. m., on Monday, August 15th, 1904, for the trial of such persons as may be properly brought before it:

Detail for the court:
Colonel John W. Bubb, 12th Infantry.
Lieutenant-Colonel H. S. Foster, 12th Infantry.
Major P. R. Egan, surgeon, U. S. Army.
Major P. G. Wood, 12th Infantry.
Major G. S. Young, 18th Infantry.
Major D. L. Howell, 18th Infantry.
Major G. W. McIver, 4th Infantry.
Capt. W. J. Pardee, 12th Infantry.
Captain G. H. Davis, 12th Infantry.
Captain F. S. Hutton, 12th Infantry.
Captain A. T. Smith, 12th Infantry.
Capt. F. D. Wickham, 12th Infantry.
Captain M. N. Falls, 12th Infantry.

Captain R. L. Hirst, adjutant 12th Infantry, judge-advocate.

5 Should any member of the court be absent the court will proceed with the business before it, provided the court is not reduced below the minimum provided by law. Upon the adjournment of the court sine die the officers named will return to their proper stations.

The travel enjoined is necessary for the public service.

By command of Brigadier-General Carter:

(Signed) D. A. FREDERICK,
Major, Assistant Adjutant-General.

HEADQUARTERS DEPARTMENT OF THE VISAYAS,
Iloilo, Panay, P. I., August 6, 1904.

SPECIAL ORDERS, No. 155.

3. Capt. F. S. Hutton, 12th Infantry, is hereby relieved as a member and detailed as judge-advocate of the general court-martial convened at Camp Jossman, Guimaras, P. I., per par. 1, Special Orders, No. 152, current series, these headquarters, relieving Captain R. L. Hirst, 12th Infantry, judge-advocate, to enable him to comply with telegraphic instructions from Headquarters Philippines Division to proceed at once to the United States.

By command of Brigadier-General Carter:

(Signed) D. A. FREDERICK,
Major, Assistant Adjutnat-General,
Adjutant-General.

CAMP JOSSMAN,
Guimaras, P. I., August 15th, 1904.

The court met pursuant to the foregoing order at 10 o'clock a. m.

Present:

Colonel John W. Bubb, 12th Infantry.
Lieutenant-Colonel H. S. Foster, 12th Infantry.
Major P. G. Wood, 12th Infantry.
Major G. W. McIver, 4th Infantry.
Captain W. J. Pardee, 12th Infantry.
Capt. G. H. Davis, 12th Infantry.
Captain A. T. Smith, 12th Infantry.
Captain F. D. Wickham, 12th Infantry.
Captain M. N. Falls, 12th Infantry.
Captain F. S. Hutton, 12th Infantry, judge-advocate.

Absent:

Major P. R. Egan, surgeon, U. S. Army.
Major G. S. Young, 18th Infantry.
Major D. L. Howell, 18th Infantry.

The above members could not reach Camp Jossman on account of nonarrival of the steamer on which they had started.

The judge-advocate announced that the department commander had requested that the court would not proceed to the trial of
6 any cases before it until the arrival of the boat bringing the other members.

The court at 10:15 a. m. adjourned, awaiting the arrival of the other members and to meet at the call of the president.

(Signed) F. S. HUTTON,
Capt. 12th Infantry, Judge-Advocate.

CAMP JOSSMAN,
Guimaras, P. I., August 16, 1904.

The court met pursuant to the call of the president at 1:30 o'clock p. m.

Present:

Colonel John W. Bubb, 12th Infantry.
Lieutenant Colonel H. S. Foster, 12th Infantry.
Major P. R. Egan, Surgeon, U. S. Army.
Major P. G. Wood, 12th Infantry.
Major G. S. Young, 18th Infantry.
Major D. L. Howell, 18th Infantry.
Major G. W. McIver, 4th Infantry.
Captain W. J. Pardee, 12th Infantry.
Captain G. H. Davis, 12th Infantry.
Captain A. T. Smith, 12th Infantry.
Captain F. D. Wickham, 12th Infantry.
Captain M. N. Falls, 12th Infantry.
Captain F. S. Hutton, 12th Infantry, judge-advocate.

The court then proceeded to the trial of Private Homer E. Grafton, Co. G, 12th Infantry, who having been brought before the court, introduced 1st Lieutenant G. H. Shields, jr., 12th Infantry, as counsel.

Ruel E. Sherwood was duly sworn as reporter.

The order convening the court and the order modifying the detail were read to the accused and he was asked if he objected to being tried by any member present named therein, to which he replied in the negative.

The members of the court and the judge-advocate were then duly sworn.

The accused was then arraigned upon the following charge and specifications:

Charge: Violation of the 62nd Article of War:

Specification I. "In that Private Homer E. Grafton, Company G, 12th Infantry, being a sentry on post, did unlawfully, wilfully, and feloniously kill Florentino Castro, a Philippino, by shooting him with a U. S. magazine rifle, calibre .30."

"This at Buenavista Landing, Guimaras, P. I., July 24th, 1904."

7 Specification II. In that Private Homer E. Grafton, Co. G, 12th Infantry, being a sentry on post, did unlawfully, willfully, and feloniously kill Felix Villanueva, a Philippino, by shooting him with a U. S. magazine rifle, caliber .30.

This at Buenavista Landing, Guimaras, P. I., July 24th, 1904.

To which the accused pleads as follows:

To the 1st specification, "Not guilty."

To the 2nd specification, "Not guilty."

To the charge, "Not guilty."

The counsel for the accused then read the following admission, which was signed and hereto appended, marked "Ex. A."

I admit that on July 24th, 1904, I was a member of a detachment of Company G, 12th Infantry, on duty at Buenavista Landing, Guimaras, P. I.; that on July 24th, 1904, I was regularly detailed on guard and was a member of the first relief. That I was on post between the hours of 2:00 and 4:00 p. m. In the execution of my duty I shot two male Philippinos with a U. S. magazine rifle, caliber .30.

(Signed) HOMER E. GRAFTON,
Private Co. G, 12th Infantry.

Findings of the court:
Of the 1st specification, "Not guilty."
Of the 2nd specification, "Not guilty."
Of the charge, "Not guilty."

The court does therefore acquit him, Private Homer E. Grafton, Company G, 12th Infantry.

The judge-advocate and the reporter were then recalled, and the court, at 10:55 a. m., took a recess until 11:00 a. m., at which hour the members of the court, the judge-advocate, and the reporter resumed their seats, and the court then adjourned until 1:30 p. m., August 17, 1904.

(Signed) JNO. W. BUBB,
Colonel 12th Infantry, President.
(Signed) F. S. HUTTON,
Captain, 12th Infantry, Judge-Advocate.

A true copy of the orders, pleas, and findings.
CLARENCE S. NETTLES,
Capt. & Actg. Judge-Advocate, U. S. A.,
J. A., Department of the Visayas.

HEADQUARTERS DEPARTMENT OF THE VISAYAS,
Iloilo, Panay, Philippine Islands, August 25, 1904.

8 In the foregoing case of Private Homer E. Grafton, Co. G, 12th U. S. Infantry, the acquittal is approved. Private Grafton will be released from confinement and restored to duty.

(Signed) WILLIAM H. CARTER,
Brigadier-General, United States Army, Commanding.

A true copy:
CLARENCE S. NETTLES,
Captain & Acting Judge-Advocate, U. S. A.,
Judge-Advocate, Department of the Visayas.

HEADQUARTERS DEPARTMENT OF THE VISAYAS,
Iloilo, Panay, P. I.

SPECIAL ORDERS,
No. 167.

[Extract.]

4. Private Homer E. Grafton, Company G, 12th United States Infantry, having been tried by a general court-martial convened at

Camp Jossman, Guimaras, P. I., and found not guilty of manslaughter, in violation of the 62nd article of war, was acquitted.

In the foregoing case the acquittal is approved. Private Grafton will be released from confinement and restored to duty.

By command of Brigadier-General Carter:

D. A. FREDERICK,
Major, Assistant Adjutant-General, Adjutant-General.

Afterwards, to wit, on the third day of December, 1904, the following decision, overruling the demurrer and plea of the defendant, was rendered by his honor, Judge Henry C. Bates, to wit:

UNITED STATES OF AMERICA,
Philippine Islands.

In the court of first instance, province of Iloilo, ninth judicial district.

THE UNITED STATES
vs.
HOMER E. GRAFTON.

Decision on motion and demurrer to indictment interposed by defendant.

In the case of Homer E. Grafton, accused of assassination, in which a demurrer to the indictment was interposed, and also a plea in bar, of former jeopardy, I shall not at this time attempt to enlarge
9 upon the reasons for the conclusions I have come to, but simply state those conclusions. It has been a very interesting question, and it has been ably handled by both sides, and many authorities cited; and an opinion upon a matter of that kind, to make it creditable to anybody, would necessarily consume much more time since the hearing than I have had to devote to it, and I do not think it would have been of any particular value, either in the case, or anywhere else.

The statement of the facts: First, I shall find to the effect that this defendant was a soldier; that he was on duty at the time that this offense occurred, and that the point where he was on duty and where the offense occurred was within a military reservation in Guimaras. Upon that question the evidence may be sent up with the case.

I think the first plea to the jurisdiction of the court must, necessarily, be overruled; that is, the substance of the demurrer that this court has not jurisdiction—that is, a general challenge of the jurisdiction of the court. It is coupled with the proposition that this man was a soldier, and was on duty in the military reservation; but I think under the authorities that have been cited, and under the

law that has been passed by Congress constituting this court, that it has the same jurisdiction in matters of this kind that the Federal courts at home have over offenses committed upon a military reservation.

Without enlarging upon the other plea, the plea in jeopardy, I am of opinion that that can not be sustained. I think it is hardly the same offense. This is a complaint for assassination. The proceedings by which he was tried under the direction of the commanding general of this division charge as an offence the breach of the 62nd article of war. They do not charge assassination. The right in time of peace of a military court to take cognizance of these graver offenses is distinctly denied, as I understand it, by inference in that provision which gives them, in time of war, jurisdiction over those cases. I do not think that under present conditions they had authority to try this man for assassination, which is murder in the first degree, and I do not think that the breach of the 62nd article of war, puts this man in jeopardy for the breach of the 62nd article of war, puts this man in jeopardy for crime he is charged with in this complaint.

But, without enlarging upon that matter, I will overrule that plea, of course with the expectation that the matter will be determined by the higher court, and will make a full statement of all the facts and all the claims, so as to present it to the Supreme Court with the utmost fairness to both sides.

So the plea and the demurrer are overruled, and the defendant is ordered to answer further, by pleading to the merits.

HENRY C. BATES,
Judge, Court of 1st Instance for the Ninth Judicial District, Iloilo, P. I.

Iloilo, Panay, P. I. This 3rd day of December, 1904.

Thereupon upon the 3rd day of December, 1904, the defendant was ordered to answer further by pleading to the merits, whereupon he pleaded "Not guilty."

Afterward the following testimony was taken during the 6th, 7th, and 8th of December, 1904:

UNITED STATES OF AMERICA,
Philippine Islands.

Court of First Instance, Province of Iloilo.

UNITED STATES
vs.
HOMER E. GRAFTON. } Case No. 248 and 249.

Case called for trial November 30th, 1904, before Judge Henry C. Bates.

Mr. Jas. Ross, supervisor of fiscals and Mr. Ruperto Montinola,

provincial fiscal, appeared for the Government, and Captain Nettles and Lieutenant Shields appeared for the defendant.

11 Complaint is read to the defendant. Captain Nettles makes a motion to quash the indictment, upon the ground that the court has not jurisdiction. Motion is overruled. Captain Nettles changes form of his motion so as to make it read demurrer. In connection with the demurrer Captain Nettles offers a map, marked "1," which is a map of Camp Jossman, including the reservation at the dock. Mr. Ross objects to the admission of the map, for the reason it is not the best evidence as to whether or not the land purported to be described in said map is or is not a military reservation. And further that the title would be the best evidence.

Mr. Nettles asks for a few minutes to produce his titles. Captain Nettles asks to have Capt. C. H. MARTIN sworn, which is done.

Questions by Captain NETTLES:

Q. Please state your official position and duties at this post.

A. I am chief quartermaster, Department of Visayas, station Iloilo, Panay.

Q. Is the island of Guimaras within the limits of the Division of Visayas?

A. It is.

Q. What is this paper I hand you?

A. This is a lease of that portion at the Camp Jossman Landing and dock which belonged to John Bordman, jr., the owner of the land when the President decided it was a military reservation.

Captain NETTLES. I offer this paper in evidence.

Mr. Ross. We object to the admission of this paper, because it is not executed as required by law, and it is not registered in the manner required by the law. It is not the best evidence of the fact sought to be established, namely, that the land on which the alleged offense was committed is a military reservation.

12 The COURT. What is the fault of the execution of it?

Mr. Ross. It is not recorded by law, also it has not been registered.

(Captain Nettles reads the document to the court.)

The COURT. I think this document will have to be admitted in evidence for what it is worth. Whether that document shall itself establish this as a military reservation is a question not determined by merely admitting the document; accordingly the objection is overruled and the document is admitted.

Captain Nettles calls General WILLIAM H. CARTER, who, after being duly sworn, testified as follows:

Questions by Captain NETTLES:

Q. Will ask you who is the department commander of the Department of Visayas, P. I.?

A. I command the Department of Visayas, under order of the President of the United States.

Q. Is the island of Guimaras included within the limits of this department?

A. Yes.

Q. What rules and regulations have you prescribed, if any, relative to the military reservation at Camp Jossman; is it what is known as Guimaras Island?

Mr. Ross. Object to the question as immaterial and irrelevant. Rules of the commanding general can have no weight as to whether or not it is a military reservation.

The COURT. I do not very clearly see the materiality of the question. It may be that some new light will be given that will be material, but there does not exist anything that seems material in my mind, unless it is that they are in actual possession of the land.

Captain NETTLES. Question withdrawn. That disposes of the evidence I have to offer that that is a military reservation, so far as the demurrer goes. I now wish to introduce affidavit of General Carter in connection with the special plea involved.

13 Mr. Ross. Object to the admission of this affidavit, upon the ground it states an opinion of law, which is not admissible. We further object for the reason the document contains the following statement: "At the time the civil authorities declined to take jurisdiction." That is entirely irrelevant and immaterial.

The COURT. I think an affidavit of that character is not the best evidence where the witness could be brought into court to testify. It certainly could not be received against the defendant, because he would have the right to be confronted with the witness, and I do not think it can be received in his favor, because the Government has the right to cross-examine. I think it would be better to have General Carter called here to testify.

Captain NETTLES. I am perfectly willing to put the General on the stand as to those facts.

General CARTER takes the stand again.

Q. When you were informed of the commission of the offense alleged against the accused in this court, it being alleged here that he assassinated Felix Villanueva, please state what steps you took, if any, as department commander, in relation to the trial of the accused for the said offense, to what jurisdiction was he offered if any.

Mr. Ross. Object to the question as irrelevant and immaterial.

The COURT. It may be received subject to your objection.

A. I was on a launch the day the offense was committed and learned of it at Camp Jossman dock about two hours later from the judge-advocate, Major Dodds. I directed a report to be made by the commanding officer at Camp Jossman, and upon receipt of that I told them not to order a court-martial until I had offered to submit the case to the court of the 1st instance. I sent the judge-advocate to Judge McCabe, then presiding in this court, directing him to

14 make the statement I have just made to Judge McCabe and return and report to me.

Mr. Ross. We object to the witness stating what Major Dodds reported to him, on the ground it is hearsay, and on the further ground it would be incompetent to show any judicial action by Judge McCabe.

The COURT. I think this report Major Dodds made to General Carter will have to be excluded, upon the ground it is hearsay. Now I think the General may state what he did in consequences of the report made to him, without stating what the report was.

A. (General CARTER.) I took the matter into very deep consideration. I believed the jurisdiction rested in the court to be ordered by me, but as a matter of courtesy I laid it before the civil authorities; I directed a court-martial to assemble at Camp Jossman, consisting of the required number of officers for the trial of the case, and took the precaution to order members of that court from other posts in order to have a fair trial of the case, without prejudice.

Captain NETTLES. I now offer certified copy of the judgement of the court-martial.

Mr. Ross. The only objection we have to offer is that the court-martial did not have jurisdiction to try the defendant for the offence with which he is charged.

The COURT. Objection overruled.

Captain NETTLES. Offer General Order 34 of the War Department as evidence, and same is marked "5" for identification.

Mr. Ross. The Government objects to the admission of this document in evidence for the purpose of establishing the fact that the land on which the offence was committed is a military reservation, for the reason it has not been shown that the conditions contained in said document "5" have been complied with by the military authorities.

15 The COURT. It may be received for what it is worth.

Captain NETTLES. We are through with preliminaries.

Mr. Ross asks to be sworn, which is done, and he testified as follows:

I will state I was in Iloilo in the month of July, this year, and that upon the 25th of July, having been informed that one Homer E. Grafton had shot two Filipinos in the island of Guimaras, I proceeded in my official capacity to file with the justice of the peace, city of Iloilo, a complaint charging said Homer E. Grafton with the crime of assassination. That upon that complaint the document, "Exhibit A," was issued, being an order of arrest, signed by Willis Lynch, justice of the peace, Iloilo. Later on, the order of arrest having been returned by the sheriff with return which appears thereon, I caused another order of arrest to be issued by said justice of the peace, on August 28th, 1904. Still later, I do not remember the date, the last order of arrest not having been complied with, I filed a sworn complaint in the court of first instance, upon which order of arrest was issued. That is all I wish to say.

Captain Nettles asks that the matter of jurisdiction of this court be carried to higher court before the accused pleads to the merits of the case.

The COURT. The motion made by Captain Nettles is overruled and the defendant is ordered to plead. The motion is overruled as a matter of law, not as a matter of discretion. It is the opinion of this court that this case must be finished by final judgment before any part can go to the Supreme Court under the new method of procedure. Of course it will not be necessary for it to go at all, if the defendant is acquitted.

The defendant pleaded "Not guilty."

UNITED STATES OF AMERICA,
Philippine Islands.

Court of First Instance, province of Iloilo.

16 UNITED STATES, *vs.* HOMER E. GRAFTON. } Case No. 248.

AMBROSIO ARBIDALLA, witness called by the Government, after being duly sworn, testified as follows:

Questions by Mr. MONTINOLA:

Q. What was your occupation in July of this year in Guimaras?

A. Working for the quartermaster's.

(It is agreed in open court that the record in this case shall go to the Supreme Court, if such is necessary, in English.)

Q. Since when have you been working for the quartermaster's in Guimaras?

A. I was employed there in March.

Q. In what month did you quit working for the quartermaster's in Guimaras?

A. Last month.

Q. Did you know Felix Villanueva?

A. Yes.

(At this point Lieutenant Shields is admitted as assistant attorney for the defendant.)

Q. What were your relations with Felix Villanueva?

A. He worked with me for the quartermaster's.

Q. Do you know since when he had been employed in the quartermaster's department?

A. He had been working a long time for them, and was working for them at the time I go there.

Q. What happened to Felix in July of this year at Guimaras?

A. When Felix left the dock with Florentino to go and get some bamboo poles and had arrived near the coal pile, at a place between

the two storehouses, we saw from the place where we were standing, which was near the coal pile, that a soldier was pointing his gun at them. Felix got off of the road he had been following, and when he got off of the road the soldier kept pointing the rifle at him and then shot him. The first shot did not hit Felix, but the second one did.

Question (By the COURT.) Did you see that?

A. Yes.

17 Q. At what distance was Felix from the soldier when the soldier fired the shot at him?

A. More than 40 brazas.

Q. Is this distance of 40 brasas, which you refer to, the distance between you and Felix, or the distance between the soldier and Felix?

A. It was the distance between Felix and I.

Q. How far was Felix from the soldier?

A. About 4 brazas.

Q. On what part of the road when the soldier fired the shot at him?

A. Felix was alongside of the storehouse and the sentry was standing in the middle of the road.

Q. Show the court in what position Felix was in at the time he was shot by the soldier.

A. When the first shot was fired at Felix he ducked down [indicating position], and when he was about to get up and run away is when he was hit by the second shot.

Q. Was he near the camarines on either side of the road?

A. Just at the corner of one of the storehouses.

Q. Where was Florentino when the sentry fired the shot at Felix?

A. Standing in the center of the street.

Q. How far was Florentino from the sentry?

A. 4½ brazas.

Q. Show to the court the positions respectively of the soldier, Felix Villanueva and Florentino, supposing both of these walls to be the respective walls to the storehouses

A. [Witness indicates position as desired.] Florentino and Felix were coming from the dock. As soon as Felix saw the soldier raise the gun, he walked over by the side of the camarine a distance of 25 feet from the soldier, and he was at that point when the soldier fired the first shot. When Felix left Florentino to go to the side of the storehouse he was looking at the soldier, and when the soldier

18 fired the first shot he ducked down. The first shot did not hit him.

Q. Who was with you?

A. Macario.

Q. What did Felix do after the soldier fired the two shots at him?

A. After the sentry had fired at Felix he also fired at Florentino, and then we started to run towards the beach.

Q. How many shots were fired in all?

A. Three.

Q. What had Felix and Florentino been doing at the dock before they left it?

A. Making checker boards.

Q. With what instrument were they making these boards?

A. A knife.

Q. What was the occupation of Felix in the quartermaster's department?

A. A boatman.

Q. Why was Felix on the dock that day?

A. He was awaiting for the steamer "Liscum."

Q. And after the checker board had been finished what did Felix do?

A. He played checkers with Florentino. Then they left.

Q. Where did Felix carry the knife when they left?

A. In his hands, cleaning his finger nails with it.

Q. Describe the knife?

A. About 10 inches long—that is, all of it, including handle.

Q. Would you recognize the knife if you saw it?

A. Yes.

Q. [Showing witness knife.] Is that the knife?

A. Yes.

Mr. Ross. Now offer as evidence the knife identified.

The COURT. Same is received.

Q. What did Felix have on besides the knife?

A. Nothing.

Q. What was Florentino carrying on that occasion at the time he and Felix left the dock?

A. Nothing.

Q. Do you know where Florentino and Felix were going at the time they left the dock?

19 A. They said they were going to get bamboo poles.

Q. What time in the day did this occur?

A. 2.45 p. m.

Q. Do you know what day of the week it was?

A. Sunday.

Q. Would you recognise the soldier who fired the shots at Felix?

A. I do not believe I would know him; American soldiers all look alike.

Q. How many people were in the street or the immediate vicinity at the time of the firing?

A. There was nobody there but the two deceased, and we came behind.

Q. Is there any military quarters in that vicinity?

A. Soldiers' quarters at a certain distance.

Q. How far are the soldiers' quarters from the storehouses, more or less?

A. 80 or 90 yards.

Mr. MONTINOLA. That is all.

Cross-examination by Captain NETTLES:

Q. At the time the shooting occurred where were you?

A. Along side of the coal pile.

Q. Which side of the coal pile?

A. On the side towards the street.

Q. Were you sitting down or standing up?

A. We were walking behind Felix and Florentino, and when we got to the coal pile Felix crossed the road in order to get out of the way of the soldier, who was pointing his rifle at him.

Q. Then you were with Felix?

A. No; Felix walked ahead and we walked behind.

Q. Who walked behind—who was with you?

A. Macario Obi and myself.

Q. Were you standing still or were you walking at the time the shots were fired.

20 A. We stopped as soon as the first shot was fired, and until the sentry fired at Florentino we had not moved from the place where we had stopped.

Q. What did you stop at the coal pile for?

A. Because we did not know why this man had been shot at.

Q. You have just stated that you stopped before the man was shot; why did you stop?

A. When Felix made the movement trying to get out of the way of the sentry we looked around to see what was going on, and when the shots were fired at Felix the first one did not hit him and he ducked down, and after that Florentino was shot.

Q. You have said a great deal about the shooting. I want to know what you were doing there and where you were going?

A. We were going to the storehouse where they sell cooked rice, because we were hungry.

Q. Who were going there?

A. Macario Obi and myself.

Q. Were you walking along with Felix and Florentino at the time, and how close were you to them?

A. Florentino and Felix were about 40 brazas ahead of us.

(It is agreed between counsel that a braza is about 2 yards, the extent of a man's arms from point to point when stretched out.)

Q. What had you been doing at the dock on that day?

A. We were waiting there for the steamer "Liscum," and when we sighted it we were to notify our superior officer.

Q. Did the steamer come that day?

A. No; it arrived on Monday morning.

Q. Were you in the middle of the street or road when this firing occurred, and how close to the coal pile were you?

A. I was 3 yards distant from the coal pile. Macario was alongside of me.

Q. Then I understand you to say you were in the middle of the road.

A. Macario was in the middle of the street and I was a little nearer to the coal pile.

21 Q. Which direction were you facing when the shots were fired?

A. In the direction of the deceased Florentino and Felix.

Q. When the shots were fired what did you do?

A. We were looking ahead when they were fired at Felix, and after Florentino had been shot he fell to the ground and we ran away.

Q. How many shots did you say were fired?

A. Three; two at Felix and one at Florentino.

Q. Where was Felix hit?

A. One bullet went in on top of the left shoulder and came out on the other side, and Florentino was shot in the side.

Q. When and where did you see the dead bodies of these two men?

A. Felix along side of the camarine and Florentino in the middle of the street, and when we saw them lay down we ran away.

Q. Is that the only time you saw the dead bodies of these two men?

A. Yes; because we ran away.

Q. You never saw them after they were there in the street and alongside the camarine?

A. No; when we saw them laying there we ran away.

Q. After you ran away did you ever see the bodies?

A. We again saw them when our foreman ordered us to bury the bodies.

Q. Were they clad in clothes when you saw them and buried them or not?

A. I believe their relatives had clothed them, because they were already in their coffins when we buried them.

Q. Did you examine the wounds on the bodies when you buried them?

A. No.

Q. You at that time were in the employ of the quartermaster's department under Lieut. Harrell, were you not?

A. He was an American lieutenant, but I do not know his name.

Q. (Calling in Lieut. Harrell and Captain Hutton.) Do you know these two men?

A. One is lieut. of the quartermasters [indicating Lieut.

22 Harrell].

Q. Is this the officer under whom you were previously employed at the dock in Guimaras?

A. Yes.

Q. Do you know this other officer?

A. He was in Supong.

Q. Did you ever see this officer at Buena Vista or the landing at Buena Vista?

A. Yes; he came there when he took a boat to come to Iloilo.

Q. I want to know if this captain ever had an interview with you at or near the Guimaras dock in relation to this case.

A. No.

Q. You deny that?

A. I saw this gentleman frequently and I also saw him when he took the statement of Felix Dasa.

The COURT. Ask him if this officer, Captain Hutton, talked with him about the facts of this case.

A. He did not talk to me, but with Felix Dasa.

Q. Where were you at the time this officer talked with Felix Dasa?

A. I was inside of the storehouse, working.

Q. Where was Felix, inside or outside of the storehouse?

A. He was also inside of the camarine, because they had us lined up there.

Q. For what purpose were you lined up?

A. Because the captain asked us about this case, and it was Felix that answered.

Q. Then is it not a fact that all of the quartermaster's employees, including yourself, were lined up for the purpose of getting information as to the facts in this case?

Mr. Ross. Object to this question as immaterial and improper cross-examination.

Capt. NETTLES. It seems to me that it is entirely proper in this line that if this witness was there at the time of the shooting, why did he suppress it when the officers were seeking information.

23 The COURT. I think you need not ask the question, all the benefit has already been derived.

Q. Why did you remain silent when you knew these officers were seeking information from you who knew these facts?

A. We wanted to give our story, but our foreman told us we should go ahead with our work, because Felix Dasa had told about it.

Q. Were you not specifically asked yourself by these officers then or afterwards if you knew anything about the killing of these two Filipinos?

A. No.

Q. Why were you discharged from the quartermaster's employment at Guimaras?

Mr. Ross. I submit this question is improper cross-examination.

The COURT. I do not see what relation it has to the case. I think it is incompetent.

Q. When were you discharged from the employment of the quartermaster's dept.

Mr. Ross. Object to this question as immaterial.

The COURT. I think it may be material.

A. I was discharged November 15th.

Q. How many other soldiers did you see in the vicinity of the soldier that did the shooting at the time of the shooting?

The COURT. He has not said he saw any soldiers. Ask him if he did see any.

Q. Did you see any other soldiers at the time of the shooting by the sentry?

A. We have not seen but one soldier, because on seeing Florentino fall we ran away.

Q. After the shooting did you ever make a report of the fact that you had seen it either to the officials of the military or any officials of the civil government?

No; we ran away.

24 Q. I do not mean the day on which the shooting occurred, but within the next week or two weeks after the shooting, when this matter was being investigated, did you then report to any military or civil official that you knew the facts in this case?

A. No; Macario told the story of what had happened.

The COURT. Where were you during the time? Did you remain there at Guimaras or did you go away?

A. In the forenoon they ordered us to go alongside of the lieutenant's house and bury the bodies.

Q. Did you stay there at Guimaras for three or four weeks?

A. Yes; I continued to work there.

Q. Is it not a fact that you knew an investigation was being made and the facts were being looked for by the officers of the Army in relation to this shooting?

A. I found out about it when Capt. Hutton made inquiries.

Q. Then why did you not tell Capt. Hutton the same story then that you have told this court?

Mr. Ross. Object, as the question is not proper cross-examination.

The COURT. He says he knew Capt. Hutton was investigating, and the question is, "Why did you not tell him the same story you have told here," which gives an inference that he told Capt. Hutton a different story. I think it is proper to ask the witness why he did not inform Capt. Hutton and the authorities about what he knew.

Q. When Capt. Hutton was investigating this case why did you not inform him of the facts you knew about the case?

A. Because Felix Dasa made the report and we wanted to make our report, but our foreman hurried us out to work.

Q. Who is your foreman?

A. Santos; I do not know his surname.

Q. Then why did you not make your report to the justice of the peace or presidente of the town at that time?

Mr. Ross. Object to the question as immaterial and irrel-

25 evant.

The COURT. I think I will allow the question to be answered.

A. Because we were afraid that our chief would get angry with us for the reason we were working for the quartermasters, and besides there was a corporal who should have reported the matter.

Q. When and to whom did you first report your knowledge of the facts in this case?

A. When Corporal Santos asked me about it I told him. He asked me what had happened and I told him.

Q. That is not an answer to my question.

The COURT. I think that is a substantial answer; you can modify it if you wish.

Q. What official of the Government did you first report this to, and when?

A. Macario reported the matter to the vice-presidente.

Q. I am not asking you what Macario did; I am asking to what official you reported, and when.

Mr. ROSS. I believe that question is objectionable, in that it assumes he reported the matter to some official.

Q. Did you ever at any time report the facts within your knowledge relative to this occurrence to any official of the Government, either military or civil?

A. Not me, but Macario.

Q. How much time on the day of the occurrence to which you have been referring did you spend at the dock on that day?

A. From 8 in the morning, when the steamer "Boordne" left, until 2 o'clock in the afternoon, when our foreman told us to leave.

Q. Then were you there at the time of a bolo fight between two natives in the morning about 11 o'clock?

A. Yes; the deceased Felix had a fight with one of the employees in the casco.

Q. About what time was that fight?

A. About 10 o'clock; I was lying down in the storehouse
26 when they got into a hand-to-hand fight.

Q. Who went and got the sentinel to stop that fight?

Mr. ROSS. It seems that they are going into the trial of another case. I do not see the bearing of this testimony in this case.

Mr. NETTLES. I think it is material in that it is to show that there was a fight there at the dock that morning and the sentry was called in to stop it, and it might show some motive for an attack on the sentry.

The COURT. I do not think it would have any bearing unless you are going to show it was Homer E. Grafton who was the sentry called in to stop the fight. If you wish to show this fact, you can do so, but not go into the story. Make your offer specifically. What do you expect to show?

Capt. NETTLES. That would require me to advise the prosecution of certain matters of defense that I do not care to now.

The COURT. I think the question will have to be excluded.

Q. How much time elapsed between the first and second shots?

A. Time enough to reload the rifle for another shot.

Q. How much time between the second and third shots?

A. As soon as he had fired the second shot, he turned around and fired the third shot at Florentino.

Q. Did the sentry load his piece from his belt?

A. The rifle was loaded. It was a magazine rifle.

Redirect examination by Mr. MONTINOLA:

Q. Did you see Felix Villanueva, before the shot was fired, run towards the sentry?

Captain NETTLES. Object to the question, as it leading.

Mr. MONTINOLA. Withdraw the question.

Q. In what position or attitude did you see Felix just before the sentry fired at him?

A. He was cleaning his finger nails with a knife and walking along the road. Florentino was walking alongside of him.

27 Q. In what position was Felix when the sentry pointed the gun at him?

A. When I saw the sentry he was pointing his gun at Felix and Felix got off the road, but he had the knife in his hand.

Q. In what condition was the knife on that day, was the blade clean, or was it in the same condition it is now in?

A. The blade was black, because Felix always carried it in the boat.

Mr. MONTINOLA. That's all.

R. M. KIRBY SMITH, after being duly sworn testified as follows:

A. I am first lieutenant and assistant surgeon, U. S. Army, stationed at Camp Jossman.

Questions by Mr. Ross:

Q. Will ask you whether or not on July 24th, this year, you were called to the landing place on Guimaras on some official duty?

A. Yes.

Q. What was that duty?

A. I was called to see two natives who had been wounded.

Q. State whether they were this Felix Villanueva and Florentino Castro.

A. I do not know their names.

Q. Were they the men this defendant is accused of killing?

A. Yes.

Q. State to the court what you saw there at the landing place?

A. When I arrived at the quartermaster's storehouse I was informed that there were two natives inside, one of whom was dead and the other seriously wounded. When I entered the storehouse I saw these two natives on the floor. One was dead and I saw the other was seriously wounded. Both had been shot by a rifle. I first examined the wounded man and saw he was seriously

28 wounded. I found the ball had entered on the right side, at a point corresponding to a line drawn 1½ inches from the right nipple extending down about 1½ inches below the free board for the ribs. The ball passed through the body and emerged about three inches to the left of the spinal column and 1 inch below the last rib.

Q. Now please describe the wounds of the man you found already dead.

A. I found on the man dead that the ball entered at the apex of the left shoulder and came out on the right side between the 5th and 6th ribs in the line of exellum.

Q. Are you able to state the cause of that man's death, or if the wound on his body caused his death?

A. Yes.

Q. Did you find any other wounds on the body besides the one you have described?

A. No.

Q. Did you notice whether there was a wound in the right arm?

A. There was none in his right arm.

Q. What kind of a ball was it that caused the wound you described?

A. A rifle ball.

Q. Can you state from your examination whether it was a U. S. rifle caliber .30?

A. I can not.

Q. What was the size of the wound at the point of entrance?

A. Large as a small lead pencil.

Q. The point of exit?

A. Rather jagged.

Q. Believe you stated in your opinion the wound caused the man's death?

A. Yes.

Q. What was the condition of the body with reference to the rigor of death?

A. It had not set in.

Q. Was the body still warm?

29 A. Slightly so.

Q. How long before had the man been shot?

A. I can not say.

Q. What hour did you go there, more or less?

A. I was called in about an hour after the shooting.

Q. The wound upon the other man whom you examined, was it necessarily a mortal wound?

A. The post-mortem showed it was mortal.

Q. What was the condition of the body and clothing of the man already dead when you arrived there as to his having bled freely?

A. I do not remember the exact amount. There was some blood on his clothes.

Q. And the other one, had he bled a great deal?

A. Not very much.

Mr. Ross. That's all.

Cross-examination by Capt. NETTLES:

Q. How came it that you went to the landing to visit these natives?

A. In the capacity of post surgeon.

Q. Then you were called?

A. Yes.

Q. And the wound on the person still alive when you arrived at the dock was slightly downward from right to left?

A. Yes; slightly downward.

Q. What did you do with the wounded native?

A. First gave dressing; then gave stimulants and a hypodermic injection of morphine; had him placed in an ambulance and carried him to the post. Just as the ambulance reached the hospital he drew his last breath.

Q. Did the wounded native make any antemortem statement to you?

A. None at all.

Q. Did you make any effort to get a statement from him?

A. No.

30 Q. Is there any possibility as to your being mistaken as to the side of the entrance of the bullet?

A. No, I am sure it was on the right side.

That's all.

MACARIO ORBE, witness for the Government, after being duly sworn, testified as follows:

Questions by Mr. MONTINOLA:

I am 20 years old, formerly employed by the quartermaster's, but now out of work.

Q. Since when have you been employed by the quartermaster's in Guimaras?

A. More than six months—about one year.

Q. On what date did you quit working for the quartermaster's in Guimaras?

A. This month—December.

Q. Did you know Felix Villanueva?

A. Yes.

Q. Where did you become acquainted with him?

Q. In the place where we worked.

Q. What was Felix doing there?

A. Boatman.

Q. Do you know what happened to Felix on or about July 24th of this year?

A. Yes; he was a boatman and always carried a knife for cutting ropes.

Q. Where was he on July 24th of this year?

A. On the dock, together with me.

Q. What was he doing on the dock?

A. Waiting for the arrival of the transport, which was expected to come in.

Q. What time did Felix go home?

A. About 2.30 p. m.

Q. What happened to Felix when he was going home at that time?

A. When he left the dock he carried a knife, with which he was cutting his finger nails.

31 Q. What was Felix doing there?

A. They came from the dock in order to go and get some bamboo pieces, and when the sentry saw——

(Interrupted by attorney.)

Q. Where were you when Felix was shot by the sentry?

A. Walking behind Felix and Florentino.

Q. Who was with you?

A. Ambrosio, the other witness.

Q. So this man was your companion [indicating Ambrosio]?

A. Yes.

Q. In what part of the road were you and Ambrosio when the sentry fired at Felix?

A. Alongside of the coal pile.

Q. How many shots did you hear fired at the place where you were?

A. Three.

Q. Did you see in what position Felix was in at the time the sentry shot him?

A. Felix was walking along the road, but when the sentry pointed his gun at him he was with his back toward the sentry.

Q. Explain the position Felix was in at the time the sentry fired at him?

A. When the first shot was fired at Felix, he ducked down, but when he was rising the second shot hit him in the shoulder.

Q. Show to the court the position Felix was in at the time of the second shot.

A. By reason of the first shot fired at him, he had ducked down and when he was about to rise he was hit by the second shot.

Q. How far was Felix from the wall of the storehouse when he was shot the second time?

A. Nearly against the wall of the storehouse?

Q. Coming from the dock and going towards the town, near which storehouse was Felix and on what side of the road?

32 A. The right-hand side.

Q. How do you know Felix was going to get some bamboo sticks?

A. Because he said so.

Q. What did Felix do after he had been fired at twice?

A. Fell to the ground.

Q. At what distance was he from the sentry when the sentry fired at him.

A. About 4 brazas.

Q. Do you know the sentry that fired at Felix Villanueva?

A. I did not know him because I was a certain distance away.

Q. How far were you from the place where this happened?

A. I believe about 80 brazas.

Q. Is that the distance from the coal pile to the storehouse?

A. Yes.

Q. What did you do after three shots had been fired?

A. First hid behind the coal pile. When we were on the beach the sentry pointed his rifle at us. I took off my hat and made some sign, and he said "All right, go ahead."

Q. Explain how you made this sign.

A. I just took off my hat and moved it back and forth and spread my arms out, and the sentry made the same movement and told me to go ahead.

Mr. MONTINOLA. That's all.

Cross-examination by Captain NETTLES:

Q. When did the soldier point his rifle at you?

A. After the three shots had been fired.

Q. The same soldier?

A. Yes.

Q. How soon after the three shots had been fired?

A. I do not know, because I was very scared.

Q. It was the same sentry who shot Felix that pointed his rifle at you?

A. Yes.

33 Q. And where were you at that time?

A. On the beach.

Q. On what side of the pier?

A. On the side of the coal pile on the other side where the water came up.

Q. Supposing this to be the road coming up from the dock and that table being the coal pile and the beach there, and also a beach on the other side of the road, I want to know which beach you were on? On the beach on the same side as the coal pile as you leave the dock and go toward the storehouses—then you were on the beach just below the coal pile?

A. Yes; we had gotten over the road and were walking already on the sand; the beach is lower than the wagon road.

Q. Did you go down on the beach as soon as these shots were fired?

A. Yes; I hurried on account of being scared.

Q. Who else was there when the sentry pointed his rifle at you?

A. My companion and myself.

Q. Did you see any other officers or soldiers about?

A. I saw the lieutenant when he went to the aid of Florentino, after having looked at Felix, who was already dead. The lieutenant went there without any shoes on and had on a kimona.

Q. Was the lieutenant there when the soldier pointed his rifle at you?

A. He was going to the aid of Florentino.

Q. Did the sentry come down to the beach when he pointed his rifle at you, or did he point it at you from the place where he had shot Felix?

A. He was walking along and coming towards us.

A. Was the lieutenant present when the sentry pointed his rifle at you?

A. No.

34 That's all.

RAFAEL YCASAMA, witness for the defense, after being duly sworn, testified as follows:

I am 58 years old; married; live in Buena Vista; my profession is a sanitary officer.

Q. For what town?

A. Buena Vista.

Q. Did you know Felix Villanueva?

A. Yes.

Q. When did you see him for the last time?

A. When he was dead.

Q. Do you know what Felix died of?

A. Santos and myself (Santos is the justice of the peace) went to visit the mother of Felix, Dominga.

Q. In what town is Santos justice of the peace?

A. Buena Vista.

Q. Where did you say you went?

A. To the house of Dominga Palacio.

Q. When?

A. I do not remember the date.

Q. What month?

A. I do not know.

Q. What is the relation between Dominga and Felix?

A. She is his mother-in-law.

Q. What did you see in the house of Dominga on the occasion you went there with the justice of the peace?

A. When the justice and I got there there was a good crowd of people there, who the justice of the peace ordered to get out, and then he ordered the shirt of Felix to be taken off and I noticed there was a wound on the left shoulder blade.

Q. Who was this that had the wound on the left shoulder?

A. Felix Villanueva.

Q. When did you go there, in the afternoon or morning?

A. In the afternoon.

35 Q. Do you remember the day of the week?

A. Sunday.

Q. What hour?

A. I do not know the hour; believe it was between 3 and 4.

Q. How far is the house of Dominga from the storehouse of the quartermaster's on the dock?

A. A little distance.

Q. How much, more or less?

A. I can not fix the distance in brazas.

That's all.

DOMINGA PALACIO, witness called for the Government, after being duly sworn, testified as follows:

Questions by Mr. Ross:

Q. Where do you live?
A. In Buena Vista.
Q. Did you know Felix Villanueva?
A. Yes; he was my son-in-law.
Q. When did you see him alive for the last time?
A. Sunday.
Q. What month?
A. July 24th, this year.
Q. What time did Felix leave your house on that Sunday, July 24th?
A. Early, because he was working for the quartermasters.
Q. What time did he return?
A. I can not tell, but it was about 11 o'clock when he returned for dinner.
Q. What did he do after dinner?
A. He returned home, but when he returned home he had some bamboo shoots with him.
Q. Where did Felix work?
A. In the storehouses.
Q. What happened to Felix on that day?
A. I do not know. When I awoke I heard some shots fired, but I did not know my son-in-law had been a victim.
Q. Did you see Felix after the shots?
36 A. People could not go away, but the lieutenant sent for me at 4 o'clock and ordered me to take the body away.
Q. Did you do it?
A. I went to the storehouse and had some people get hold of the body.
Q. Which storehouse?
A. The new one.
Q. Where was the body taken to?
A. To my house.
Q. Did you see the wounds?
A. No, because I was weeping; furthermore I am afraid of corpses.
Q. This storehouse where you went to get the corpse of Felix Villanueva, is it on the beach near the dock at Buena Vista?
A. Yes.
That's all.

WILLIS LYNCH, witness for the Government, after being duly sworn, testified as follows:

I am justice of the peace of Iloilo; married; live in Molo.

Questions by Mr. Ross:

Q. Are you familiar with the military post of Camp Jossman and

boat landing and Government storehouses on the water front in Guimaras?

A. Yes.

Q. Do you or not recollect of having been at that place on Sunday, July 24th of this year?

A. Yes, I was there.

Q. State whether or not while you were there your attention was attracted by any special occurrence or circumstance; and if so, state the particulars.

A. On July 24th I was at Camp Jossman, and returning to the boat landing, at about 3 o'clock, I noticed when opposite the warehouses, or just before I got to the warehouses, quite a number of soldiers leaving the warehouse. I was in a wagon and on get-
37 ting out I heard a groaning inside of the warehouse, and I went in there, and there was a man to the left, just inside, that was dead, and some 15 or 20 feet further in th room was the man groaning. There was a lieutenant there, and after looking around I spoke of the necessity of taking this man's dying statement, and told the lieutenant I was justice of the peace of the municipality of Iloilo, and in addition to that I had jurisdiction for preliminary examinations over the entire province. He said, "I will inform you this is a military reservation, and we will have to look after this," I said something further, and he then got a blank book and sent for an interpreter, and after a few minutes the interpreter came and they started to take the statement of the man, but previous to this he told him he was going to die, and the man swooned away, and it was 2 or 3 minutes before he came to. When he came to they asked him his name and another question or two, but the statement was not taken.

Q. Did you hear the conversation between this man and Lieut. Harrell?

A. Yes.

Q. Do you remember the name the man gave?

A. It seems like San Augustin; I am not positive.

Q. State whether or not you had any conversation with this apparently dying man.

A. Yes; I asked him as well as I could the cause of the trouble, if he had had any fight, and he said "No."

Capt. NETTLES. I ask the usual grounds be established that the man was warned that he was going to die.

Q. Was your conversation with him after he was informed by Lieut. Harrell that he was going to die?

A. Yes.

Q. How long after?

A. He could only talk a few words at a time.

Q. State whether or not all the conversation you had with him was after he had been told by Lieut. Harrell that he was going to die.

A. Yes, it was.

Q. What was that conversation?

A. I asked him if he had had any fight with the soldier, and he said he had not. I asked him if there were any bad words
38 between them, and he said "No." I asked him if he had any knife, and he said "No." I asked him where he was shot, and he put his hand to his back.

Q. Did you observe the nature of the wounds on either of these men?

A. I looked at them both.

Q. With what instrument had the wounds been made?

A. Gunshot. The first one, nearest the door, was shot in the right shoulder and the bullet came out under the right arm. The man nearest the door had bled very freely, and I noticed the blood tracks, or drops where he had been brought in, led around to the ontside of the wall, and nearto this was a large pool of blood. I noticed above that blood in the wall two bullet holes that had gone through and a little less than my hand apart. These holes were just above my kneecap, with my back against the wall. Not more than an inch or 1½ inches above my kneecap, and about the width of my hand between them.

Q. What was the position of the blood with reference to the bullet holes?

A. The blood was almost right under the bullet holes, possibly 6 inches away from it.

Q. Have you been to the place where the warehouse is situated since July 24th of this year.

A. I was there one day last week.

Q. Will ask you to state whether or not the ground along the side of that warehouse below those bullet holes is in the same condition now that it was in on July 24th?

A. It is now a little lower. It had just been built and was built up nearly even with the corrugated iron. Now it is much lower, the road having been beaten down, that is the rocks, and it is 3 or 4 inches lower.

Q. Anything else you observed there?

A. I looked at the bullet holes, and one of them came
39 through and struck the upright piece of sill and lodged in it; the other bullet struck the round of a chair, glanced, and went through a board under the side of the table and struck the railing that separates one part of the warehouse from the other part. I got down and looked through these holes and also the holes in the scales out through the bullet holes where they would lead to, and they led out to about 25 to 40 feet from where the pool of blood lay. They would lead to that point, judging from the angle and height a man would be.

Q. State whether you made any further examination of the ground around the blood spots, and what was the result.

A. Where this man lay against the wall there was blood run out into the street and then came around and led into the door where the

man lay. Other than that I could see no indication of blood marks. The man that was shot through the stomach did not bleed at all.

Q. Which one was shot through the stomach?

A. The one alive.

Q. Where was the one dead shot?

A. In the shoulder and the bullet came out on the right side. The wound on the right side bled freely.

Q. Wish you would describe the situation of the dock and buildings there at the landing at Guimaras, beginning at the dock as one lands from a boat, and walking up the road, describe the location of the coal pile, warehouses, and other buildings.

A. This table being the dock, it is built out into the water, and as you go up the dock you reach a large coal pile. The dock is built of stone and timber.

Q. How far from the dock is the coal pile?

A. From the landing point about 100 yards, and beyond the coal pile about 50 or 75 yards there are 2 warehouses—one on each side of the road. The street is about 70 feet wide.

Q. What is the distance from the coal pile to the distance where you observed two bullet holes in the wall?

A. Roughly estimated, 70 yards.

Q. About what time of the day did you arrive at the warehouse?

A. About 3 o'clock in the afternoon.

Q. Do you remember what day of the week?

A. Sunday.

Mr. Ross. That's all.

Cross-examination by Capt. NETTLES:

Q. Would like to ask you if you personally asked the questions and received the answers from this wounded native at the time you spoke of in the first part of your direct examination?

A. Yes.

Q. Would like to have you describe to the court the relative elevations between the beach, both sides of the road at the coal pile in comparison to the height of the road?

A. There has been but little change since. It was at that time freshly built and only level with coarse rocks. It was all rock.

Q. Is the road higher than the beach?

A. The road is not as high. That it built up a little higher than the road at this point. I think the road a little further down is a little higher than the beach. The slant is a little toward the beach.

Q. What I want is the relative differences in height in the road bed proper on which the coal pile is located and beach on either side of the road at that point?

A. I should think the road is a little higher, probably 6 inches. That's all.

Lieut. W. F. HARRELL, witness for the Government, after being duly sworn, testified as follows:

I am second lieut., 12th Infantry, stationed at Camp Jossman.

Questions by Mr. Ross:

41 Q. Where were you stationed on July 24th of this year?

A. At the beach Camp Jossman.

Q. Are you acquainted with the defendant here?

A. I know him.

Q. Who is he?

A. Private Grafton, Co. G, 12th Infantry.

Q. Do you remember having seen the defendant on July 24th of this year?

A. Yes.

Q. Please state the circumstances under which your attention was attracted to him on that day, if it was?

A. About 3 o'clock on the day mentioned, I heard two shots, and I left my quarters and went toward the storehouses. There I found the defendant and two natives that were shot.

Q. What was the defendant doing?

A. Sentry on post.

Q. Were there any other persons around there at that time?

A. I may have been preceded there by one or two soldiers—there were no others in the immediate vicinity.

Q. Describe the position in which you saw the two natives there?

A. One of them was lying in the center of the road, his feet pointing slightly to the northeast.

Q. Away from the beach?

A. Away from the beach, with his head towards the beach. The other, Felix Villanueva, was lying some distance back of him, 12 or 15 feet, against the wall, as he had fallen back with his head and shoulders against the wall of the storehouse.

Q. Were they both dead?

A. Neither of them were dead at this time.

Q. Did either of them die later on?

A. One in a few moments.

Q. Which one?

A. Felix Villanueva.

Q. Did the defendant at that time make any statement to

42 you as to who shot these two men?

A. He made a statement that gave me to understand he had shot them, I do not remember just how he said it.

Q. Was he armed at that time?

A. Yes.

Q. What kind of a weapon?

A. U. S. magazine rifle, caliber .30.

Q. Did you or not take any notice of his rifle at that time as to whether or not it had been fired?

A. I did not look at it myself, but asked him if it was loaded.

Q. What did he say?

A. Yes.

Q. Had you known these two men, Florintino Castro and Felix Villanueva, before July 24th?

A. I can not say that I knew them, I did not know them.

Cross-examination by Capt. NETTLES:

Q. Lieut. Harrell, did you make an investigation immediately after the occurrence, in the course of which the accused made any statement; if so, will ask you to relate fully the statement made by the accused.

Mr. Ross. Object to the question, as improper cross-examination. It is only proper for counsel to ask as to the conversation he had at the time, any other investigation is improper.

Capt. NETTLES. I think the question is proper, for the prosecution have brought out that Lieut. Harrell on hearing the shots proceeded to the spot. It seems almost unnecessary to say that he being the officer in charge would make an investigation.

The COURT. Think he may answer the question as to what was said by the accused at the time Lieut. Harrell came up and not go into conversations held afterwards.

A. The first thing I asked him was if his piece was loaded. He answered yes, and I told him to unload it. He stated he was
43 walking his post in a westerly direction from quarters towards the coal pile when he observed two natives coming in the direction from the beach, crossing the stone wall somewhere between the coal pile and the warehouses. He said he was about midway between my quarters and the east end of the storehouse when he first saw these natives. That he continued along his post until he got up within a few feet of the storehouse, and at this point the two natives had reached nearly to the western end of the storehouse. He said at this time he saw one of the natives take a large knife and put it in his shirt and twirl it in his hand for a moment, immediately putting it behind his arm. The action of the natives being suspicious he crossed to the other side of the road, opposite to the natives and continued along the north side of the road until he was nearly midway between the storehouses. At this point the natives were within a few feet from him in a northern direction and when some few feet away the one nearest him was in a crouching position as though he was about to change his knife to make a spring and at this instant he fired. He fired two shots without anything more to do, simply fired both shots. He also stated the natives had been acting suspicious.

Q. That is the substance of his conversation?

A. That is the substance of what he said.

Q. How many shots were fired?

A. Two.

Q. Are you positive on that point?

A. Yes, I am.

Q. What interval was there between the two shots?

A. Very little.

Q. How soon after the firing did you get to in sight of the sentry?

A. I was within sight of him within a few seconds. Simply had to go a distance from here to the corner of the room.

Q. Were you alert?

44 A. Yes; I moved in a run.

Q. When you came in sight of the sentry what was he doing?

A. He was standing very near the same place when I got there—that is, a few feet from these two natives, and was looking, as I remember, towards the beach. His head seemed to be in an inquiring sort of a way.

Q. What was the position of his piece?

A. In his hands.

Q. Who else was in sight at that time?

A. Capt. Davis, and a number of soldiers.

Q. How many natives were within your range of vision?

A. I remember seeing none.

Q. Did you see any natives near the coal pile?

A. No.

Q. Did you look towards the coal pile?

A. Towards the reservation I saw none.

Q. What is the distance from the coal pile to the point at which the sentry stood when the shots were fired?

A. About 100 yards.

Q. How many seconds elapsed after hearing the shots fired before you left your house and had the sentry within your sight?

A. I had him in view before I left my house. I had him in view as soon as I stepped on the porch from the time I left my room. It could not have been more than 12 to 15 seconds.

Q. From the time when you first saw him did he leave the particular spot in which he stood until you arrived—did he change his position?

A. He may have made a step or two one way or the other; practically the same place.

Q. Did you see him point his piece at any other natives after the firing of those shots?

A. No.

45 Q. Had he pointed his piece at any natives would you have seen him?

Mr. Ross. Object to the question, as it calls for an opinion of the witness.

The COURT. I understand the lieutenant has testified that the sentry was in his view all the time until he got there, and that practically answers the question, as he says he did not see him point the rifle at anyone.

Q. Please relate again the position of the two bodies in the road when you saw them. In answering the question will ask the lieutenant to look at this map.

(Witness takes map and shows to the court the location of the bodies as requested.)

Q. At the time you heard the two shots fired did you hear anything else?

A. I heard a cry of alarm.

Q. Who made that cry and what was it?

A. When I heard the cry I thought it was one of the sentries, and I judged it was this one. The cry, as I recall it, was: "Come here; somebody is trying to kill me."

Q. How soon after the shots did you hear that cry?

A. Almost at the same time.

Q. You stated you were in command at this point of the military reservation; please state the orders of sentry on post No. 1.

A. It extends from the hydrant to the coal pile, leading along the road during the day. At night from the coal pile to the storehouses, reaching around the storehouse and to the end of the dock every 30 minutes. The sentry will allow no Government property to be handled or interfered with or removed. He will require natives in passing through the reservation to stay strictly in
46 the road without loitering. Will not permit natives to go to the hydrant for water, except for Government purposes. In case the telephone rings three times and the storehouse is closed, report the fact. At night if boats come along the dock, report the fact to the corporal in time for two soldiers to meet this boat and tie it up. Orders in general.

Q. Did the orders provide for the halting of persons on that reservation in the daytime?

A. No.

Q. Appearing upon the scene and finding these dead bodies, what action did you take?

The COURT. I do not believe that is proper cross-examination. What do you mean, Captain Nettles?

Capt. NETTLES. I would like to bring out the action of the officer. He was in command there, and I think it is proper to show what he did.

The COURT. With reference to relieving the wounded men and taking care of them?

Capt. NETTLES. Both as to relieving them and the accused. He has testified in part, and I want to bring the whole thing out.

The COURT. The point is whether Homer E. Grafton, the soldier on trial, was justified in what he did before the lieutenant arrived there. There is no inference the lieut. did not do his duty; on the contrary the inference is he did do it.

Capt. NETTLES. There is a question of memory involved. There

may be a variation between the testimony of this officer and the two natives. I submit if this officer then and there made a careful examination and reported it in writing what was said and done at that time, it seems that fact being established would strengthen the testimony of the officer as to the matter of memory. It is for your honor to determine whether this officer is to be believed or those two natives who testified this morning.

47 The COURT. You may ask this officer if he made at the time or immediately after a note of the facts he has testified to here.

WITNESS. Yes; I did.

Q. When did you do that?

A. In the course of 45 minutes after the affair occurred. I took written testimony of anything I could find bearing on the case.

Q. What steps did you take, if any, to procure a dying declaration of the native still alive when you found him?

A. I questioned him myself, or attempted to. I told him he was going to die, and that I wanted him to tell me all he could. He was slow to answer, and did not seem disposed to talk. I had an interpreter, a member of the detachment, to come and make my statement clear to him so he might understand.

Q. What did he state, if anything?

Mr. Ross. This is getting out of cross-examination.

The COURT. What do you say, Capt. Nettles, as to whether this is a subject upon which you can touch. Would it not be better for you to put in your evidence and recall this witness if you wish to inquire of him in this line.

Capt. NETTLES. All right, your honor.

Redirect examination by Mr. Ross:

Q. What were the orders on July 24th with regard to the residents of that neighborhood passing up and down that road which runs from the dock between the warehouses—the road on which the shooting occurred?

A. In passing through the reservation sentries would require them to confine themselves to the road.

Q. Were they or not allowed to pass up and down the road freely under those conditions?

A. At my discretion and under surveillance.

48 Q. In the exercise of that discretion did you permit them, or not?

A. On that day they were permitted to pass.

Q. What are the orders in regard to sentries on post carrying his piece loaded in daytime?

A. There were no orders.

Q. Were there on July 24th?

A. No.

Q. What were the orders in regard to soldiers carrying bayonets?

A. There were none.

Q. Was that a part of the equipment of a soldier on guard, to have a bayonet attached to his belt?

A. Not necessarily.

Q. Did you permit your men to go on guard without their full equipment?

A. I determined the full equipment myself.

Q. What were your orders?

A. The uniform, campaign hat, gun, belt, and trousers.

Q. Do you remember if the men on guard did carry bayonets?

A. No; I do not believe they did. They did not carry them fixed.

Q. I am not speaking about being fixed, as to their being on their person; do you remember if that was done on July 24th or not?

A. They may or may have not.

Q. Do you remember whether Homer E. Grafton had a bayonet attached to his belt when you saw him?

A. I do not remember.

Q. How many rounds of ammunition was a sentry required to carry?

A. Ten.

Q. I believe you said his gun was loaded when you approached him?

A. Yes.

49 Q. Did he unload it in your presence?

A. Yes.

Q. He had the magazine loaded?

A. I think so; I am not sure.

Q. Do you remember how many cartridges he took out of his gun?

A. I do not know. The magazine may have been loaded and may not. My object was to unload the gun.

Q. What did he do when he unloaded the gun; merely unloaded the barrel, or magazine?

A. I do not remember.

Q. Did you count the cartridges in his belt?

A. No.

Q. What was the distance from the place where Grafton was when you arrived on the scene, and the quarters of the men stationed near the warehouse?

A. 75 or 80 yards; do not know exactly.

Q. Do you remember, approximately, the number of men in your attachment?

A. On July 24th, from 18 to 30.

Q. Do you recall the exact number on that day?

A. No.

Q. Approximately?

A. 24 to 30.

Q. How long after your arrival on the scene was it before Grafton was relieved from guard, if he was relieved.

A. He was relieved in probably ten or fifteen minutes.

Q. What was he doing in the meantime?

A. Standing about the storehouse, as I recollect.

Q. Was he talking to you all the time?

A. No; there was a good deal of excitement there. The guard turned out.

Q. Then you did not see him?

A. No; I was busy.

Q. You did not have your eyes on him during the ten or fifteen minutes?

A. No.

50 Q. Is it not a fact he was relieved by the men?

A. I directed that he be relieved.

Q. You said something about the position of the arms of this man lying against the wall. Please explain again the position of this man, as I did not understand plainly.

A. I stated that I remembered the man was lying as though he had fallen back against the wall and his head was against the wall.

Q. Do you remember the position of his right arm?

A. Do not.

Q. You say he had apparently fallen on his back?

A. Apparently so; neither sitting, standing, or lying down.

Mr. Ross. That's all.

WILLIS LYNCH recalled by the Government.

Questions by Mr. Ross:

Q. Will ask you to state whether or not you took notice as to the size of the two men you have described as lying in the warehouse, one dead and the other in a dying condition?

A. They were medium sized men. One of them a little under size and the one dead rather delicate.

Q. When you say medium sized, what standard do you use?

A. Medium size Filipino.

Q. What would you say the size of Felix Villanueva approximately would be?

A. The one that was dead was not far from the size of the third man there on that seat [indicating a medium-sized Filipino], probably not quite as heavily built. He had a very small neck.

Q. How was he dressed?

A. Had on a shirt, and I think colored pants, barefooted. His hat was not by him, but two hats were by the other man.

Q. What would you say to be the height of this man Felix Villanueva?

A. About 5 ft. and 4 inches.

51 Q. What about his weight?

A. About 120 lbs.

Q. Referring to the pool of blood under the bullet holes, how large was it?

A. Bigger than both hands; had settled down in a little hole between the rocks.
Q. Do you mean in diameter?
A. Across as big as both hands.
Mr. Ross. That's all.

D. M. FALVEY, witness for the Government, after being duly sworn, testified as follows:
I am a clerk, quartermaster's division, Guimaras.

Questions by Mr. Ross:

Q. How long have you been employed as quartermaster clerk at Guimaras?
A. Since a year ago last March.
Q. Will ask you whether or not it is your duty to keep the regular rolls of laborers employed at Guimaras?
A. Yes; it is.
Q. Did you ever know a Filipino by the name of Felix Villanueva?
A. Yes.
Q. How did you happen to know him?
A. He was employed by the quartermaster's at Buena Vista.
Q. When was he employed?
A. A year ago.
Q. How long was he in the service of the Government?
A. About one year.
Q. What were his duties?
A. He was a laborer.
Q. At what particular place?
A. Buena Vista.
Q. At what work?
A. Handling cargo.
Q. Will ask you if you mean the landing (when you say Buena Vista) opposite the Government storehouses at Guimaras?
52 A. Yes.
Q. Was he employed there in July this year?
A. Yes.
Q. At the time of his death?
A. Yes.
Mr. Ross. That's all.

Capt. NETTLES, cross-examination:
Q. Did you know the character of Felix Villanueva?
Mr. Ross. Object to the question as improper cross-examination.
Q. Do you know the character of Felix Villanueva as to fighting and combativeness?
The COURT. That comes in the same list as the former question and we had better not receive it just now, but it can come when it is proper.
Capt. NETTLES. That's all.

Mr. Ross. We have another witness and possibly two, but they are not here, and we will rest our case, with the privilege of calling the other witness when we can get him.

This is agreed to by Capt. Nettles, and the defense proceeds with their witnesses.

Lieutenant W. F. HARRELL, called by the defense as witness.

(Witness not sworn, as he was sworn as the Government's witness.)

Questions by Capt. NETTLES:

Q. In relation to the site of the Government reservation at Guimaras dock, have you made any plan or plat since the last meeting of the court?

A. Yes.

Q. Covering the distances and measurements of the buildings and the dock there?

A. Yes.

Q. Is this paper (marked "AA") a plat you have made of Guimaras landing?

A. Yes.

Capt. NETTLES. I now offer as evidence document marked "AA."

53 Mr. Ross. Object to this, for the reason it appears upon the face thereof a mark marked Florentino Castro, another mark Felix Villanueva, and another Private Grafton, and certain distances indicated, which would seem to make it the intention of the defense to attempt to show by this plat the situation of the deceased and also of Grafton, as testified about in this case. We submit that is no part of the map. The map should show the situation of the ground as it is and the buildings, about which we would make no question, but we submit the location of these bodies and of the defendant is oral testimony and cannot be shown by any map. If these are removed we have no objection to same being admitted.

Capt. NETTLES. We have no objection to them being removed. They are put there by Lieut. Harrell as he remembers it and are not binding on anyone except in relation to his testimony.

The COURT. Think the document may be admitted as illustrating the relative position of the ground, etc., but in relation to the defendant and the two bodies it is merely a claim and not evidence. With that view the plan may be received.

Q. Referring to the map, what is the distance from the coal pile to the west end of the warehouse?

A. 277 feet; that is, from the west end of the storehouse to the center of the coal pile as it is now.

Q. What distance apart are the two warehouses?

A. 42½ feet.

Q. What is the width of the roadway leading from the Guimaras dock between the two warehouses?

A. The same; it extends the full distance; probably six inches on each side that are eaves, making the road about 41½ feet wide.

Q. Please locate on the map which you have before you the relative situation of the sentry and the two wounded Filipinos, as you observed them upon arriving on the scene on July 24th last, and the distance betwen the sentry and the two bodies.

54 Mr. Ross. We object to that question; the location of these bodies can not possibly be shown by a map. It might be competent for the witness to point out to the court, but to go into the record as location of things that do not exist at present I submit is not competent. I am inclined to think it is competent to make a sketch of the plan of the witness and introduce it in connection with his testimony.

The COURT. It is merely an illustration of his memory. You can make it just as plain as you wish in cross-examination. I am inclined to believe this is competent.

Questions by the COURT:

Q. Have you marked on that plan a place where you say the sentry and the two bodies were when you arrived there?

A. Yes.

Q. How have you marked the position of the sentry?

A. By a dot with a small circle around it.

Q. And where Felix Villanueva lay?

A. That is marked the same way; near the southerly storehouse.

Q. And the other body, that of Florentino Castro?

A. That is marked the same way, near the center of the road.

Q. You had no mark upon the ground to go by in making this map as to those points?

A. Nothing that was left there by the persons at the time. These marks were first selected by me and the distances measured and put on this map.

Q. Does this map show the two storehouses?

A. Yes.

Q. Is there anything to mark where Villanueva lay near the storehouse?

A. There were two bullet holes.

Q. But the spot where the other two persons are—that is from your memory as you saw it when you arrived there, is it not?

A. Yes.

Questions by Capt. NETTLES:

Q. State the distance from the coal pile to the west end of the warehouse.

55 The COURT. He has stated that once before.

WITNESS. The distance as located here are as follows: Private Grafton from the northerly storehouse 10 feet, and to the southwest. The position of Florentino is 10½ feet from Private Grafton and 18 feet from the northerly storehouse. Felix Villanueva is 30 feet from Florentino Castro, and against the southerly storehouse.

Q. Going back to the occurrence of July 24th, please state pre-

cisely what you did on hearing the shots fired and the steps you proceeded to take.

Mr. Ross. Object to the question as immaterial and irrelevant.

The COURT. Form your questions instead of asking the witness to go over what he has already stated.

Q. What efforts, if any, were made to procure dying statements from the wounded Filipinos by yourself or anyone in your presence?

A. Soon after I reached the scene these men were put in the storehouse; probably 5 or 10 minutes afterwards, and an effort was made on my part through an interpreter to give them an opportunity to tell all they could about the occurrence. One of the natives was dead at this time, and the other in the center of the road, so the only one left to make a statement was mortally wounded, and I told him that he was going to die and would probably die in a short time. Then I tried to question him myself, but he did not understand, and then I had a soldier of the detachment ask him some questions. Asked him to tell just how it happened, but he just groaned. I then questioned him if he had any words with the sentry and he said, No, he did not say anything to the sentry. He was then asked what he was doing there, and he said he had been walking around the dock and was there without any particular reason. That is all that was gotten out of him in my presence.

56 Q. Did Mr. Lynch, the justice of the peace of Iloilo, take any statement from this Filipino in your presence at that time that you know of?

A. Mr. Lynch had a good deal to say about this time, and it was necessary for me to remind him that he must keep out of it; that I was making an investigation and that he would have to withdraw, though the dying statement was taken on his suggestion.

Q. May Judge Lynch have had a conversation with this wounded man that you are not aware of, in your presence?

Mr. Ross. Object to the question, as it is calling for an opinion of the witnes.

The COURT. I think it is competent to show by him if he was with the wounded man all the time.

Q. How was that, Lieutenant?

A. I was not there all the time. I went to my quarters to change my clothes or put on my uniform and then I made an inspection.

Q. Upon you' arrival at the scene of the shooting, state the manner and bearing of the accused.

Mr. Ross. Object to the question, calling for the opinion of the witness.

The COURT. I think it is competent for him to state if the man did the shooting was calm, cool or excited.

A. I considered him calm for the circumstances, although he was probably a little excited, enough to be a little nervous.

Q. Did you observe any signs of levity on the part of the accused?

A. No; none whatever.

Q. Did you observe any appearances of intoxication or appearance of his being under the influence of liquor?

A. None whatever.

Q. What is the character of the accused for self-control, coolnes and soldierly conduct?

Mr. Ross. Object to the question as irrelevant and immaterial.

57 The COURT. It is supposed to be first class until it has been attacked. I think this will have to be excluded until the Government attacks. It is competent for the defendant to put his character in issue, but not in this way.

After a lengthy discussion by both sides, the court makes the following ruling: I confess for a moment I was mixed. The question of character may be put in issue in the beginning by the defendant; that is, he may give evidence to show he is a man of good character before it has been attacked. Now, I think if his character is in issue at all here, that it is in issue with respect to all of its qualities, of all that might have led him to do this act, and I am inclined to believe his character for steadiness and excitableness, and his character for soldierly qualities would embrace all those things, and the defendant, if he desires, may put in evidence with reference to those points. It is much better to go into a full explanation of this case than to exclude anything that might belong in the case.

(Last question repeated.)

A. Both within my knowledge and his reputation it is "excellent."

Q. What would you say as to the size of the two Filipinos you observed on that day, as compared with the average Filipino?

A. In height Felix Villanueva was probably taller by an inch or 2 than the average Filipino. Florentino was probably the average size, but a good deal more muscular and heavier than the average Filipino.

Q. Can you state about the weight of Felix Villanueva?

A. Probably 130 pounds.

Q. What was the reputation of Felix as to combativeness, if you know it?

Mr. Ross. Object to the question as incompetent.

The COURT. I think this question will have to be excluded.

Q. Do you know the course of the bullets fired by the accused on that occasion? If so, please explain as to whether they entered the wall, or any observations you made.

58. A. The bullets passed through the corrugated iron about 24 inches from the ground. The center of the two holes is about 1½ inches apart. After coming through the wall they seem to diverge, one going in the back of the scales and the other into the back of a chair. The distance between the two points named was about 10 to 14 inches, I judge. That is, they had diverged at a distance of 1½ feet from the wall about one foot. After that there was evidence of one having ricochet'd to the right and took effect in the small gate leading into the storehouse.

Q. At what height above the ground upon that corrugated iron wall was the point of entrance of those two bullets?

A. I have not measured it, but I judge nearly 2 feet—20 inches or 2 feet.

Q. What is the distance from the point of entrance in the corrugated iron wall to the point where you have indicated where the sentry stood when you found him upon arriving upon the scene?

A. About 45 feet.

Q. You have stated that within 10 or 15 seconds after the firing of the shots you arrived on the scene; did either of the natives move of his own motion from the place where they were lying when you first saw them?

A. No; contraction of the muscles, groans, but no change of position.

Q. Did you observe any unusual movements or acts on the part of the natives about the Buena Vista landing on July 24th?

Mr. Ross. Object to the question as improper and irrelevant.

The COURT. I think that question as presented will have to be excluded.

Q. You stated in your previous testimony that you made an inspection of the Buena Vista landing after the shooting; why did you do so?

59 Mr. Ross. Object to the question; same ground as before.

An inspection the witness made after the affair, I think, is not competent.

The COURT. This man is accused of assassination. The defense, as it has been outlined, is that he did this act in self-defense; that he had reason to believe and did believe these natives were approaching him with the purpose of assaulting him and with dangerous weapons. Now, we have got to take matters as they stood at the time of the act. What subsequently developed could not have influenced his conduct at the time he did the act, and knowledge possessed by another individual and not by him could not have influenced him. Objection is sustained.

Q. Do you recognize this knife [showing witness Exhibit A]?

A. Yes; it is apparently the same knife that was picked up in the road at the time of this shooting, July 24th.

Q. Is it in the same condition now as it was then?

A. No; it was not as rusty then as now, and I do not believe it was as shaky.

Q. Do you know Ambrosio Orbidilla and Macario Orbe?

A. I believe there were two such men employed in the quartermaster's department, but I hardly knew them.

Q. What steps did you take and what efforts did you make to get any information that could be gotten from the quartermaster's employees under you at the Guimaras landing?

Mr. Ross. Object to the question, as it is immaterial.

The COURT. You may ask him what he did.

A. I had all the employees lined up in the storehouse one afternoon, at request of Capt. Hutton, and through the foreman of the employees they were explained the circumstances and the reasons why we wanted this information, and each was asked individually again and again if he knew anything at all about the facts in connec-
60 tion with the shooting on July 24th. None admitted knowing anything about it, and they answered to the negative.

Q. Were these two witnesses in that line?

A. One of them was; I do not know what name he answered to.

Q. And the other one you think was not?

A. I do not know; he might have been and he might have not.

Q. Ambrosio you mean?

A. It was the larger one of the 2.

Cross-examination by Mr. Ross:

Q. Were you present when they were lined up at the warehouse?

A. Yes.

Q. Who asked the questions?

A. Asked through an interpreter by Capt. Hutton.

Q. Who was the interpreter?

A. Felix Santos, foreman.

Q. Where was the inquiry held?

A. In the north storehouse.

Q. When?

A. 10 or 12 days after the occurrence.

Q. Were all the employees of the quartermasters present?

A. They were supposed to be; there might have been one or two absent.

Q. Yes; but were they?

A. I could not say every one was.

Q. You particularly noticed one of the witnesses who testified in this case?

A. I could almost swear I noticed both.

Q. Will you tell us how you are so positive; what fixed that in your mind at the time?

A. I might add a good memory.

Q. How many natives were present?

A. Maybe 30; maybe 20.

Q. What were the names of some of the others present?

A. Biscao—I do not know their names, but their faces.

61 Q. You noticed particularly these two witnesses were there?

A. I have answered that.

Q. You noticed particularly, did you, that both of these men were there?

A. I said before I could almost swear to it.

Q. I asked you if you noted particularly these two men on that occasion, not what you could swear to, but what you noticed on that occasion.

A. I noticed one.

Q. Which one?

A. The largest.

Q. What particular thing attracted your attention to him?

A. The man had at the time a large sore on the bottom of his foot, and the state of his health was a matter of consideration by me, and I thought several times of having him receive medical attention.

Q. That is what attracted your attention?

A. That man is better known to me.

Q. That is what caused you to notice him on that occasion?

A. Indirectly; yes.

Q. Now, Lieut. Harrell, you have testified that you knew certain things from hearsay and of your own knowledge as to the character of the defendant. I want you to tell us what you know of your own knowledge about the defendant.

A. I know he was a member of my detachment in July, and that his conduct was most excellent during that time.

Q. How do you know that?

A. From what I saw.

Q. What did you see that caused you to believe that his character was excellent?

A. As a soldier.

62 Q. In what respect, please explain to us?

A. The manner and method in which he related his story to me and in my presence on one or two occasions, and the way he has borne himself ever since.

Q. Did you know Grafton well before that time?

A. No.

Q. Your opinion is formed by things that have happened since that date?

A. On that date.

Q. What did you notice particularly on that date that caused you to believe his character was excellent?

A. His bearing; the way he related events, and the way he acted through the whole affair.

Q. Please tell us what you mean by his bearing.

A. His manner of conduct, the way he looked, talked, and the amount of excitement he showed and did not show. The amount of feeling, and all of those things.

Q. He was particularly cool, was he?

A. I did not say he was; he was not.

Q. On his conduct on that day and bearing is what you base your statement on that he is a man of excellent character?

A. That and other things.

Q. What other things?

A. The way he has conducted himself at this trial and other trials; the way he conducted himself at the post. All those things made me believe the man is an excellent soldier.

Q. Referring to the condition of the ground over there, is it not

a fact that on July 24th the ground alongside of the warehouses below those buliet holes was somewhat higher than it is now; that is, the rocks and earth were loose—that made it some higher?

63 A. It is a fact that the ground had been filled in and has since been beaten down by wagons. There may *be* a difference of 1 or 1½ inches between them.

Q. You testify it was not more than one and one-half inches on July 24th?

A. Yes; in my judgment.

Q. Lieut. Harrel, on what do you base the statement that you have made on the map in evidence as to the difference between the two bodies of the two found there and the distance between them and the sentinel; from what did you prepare that matter?

A. The position of these men was selected on the ground from memory by me and then the distances were measured with a tape line.

Q. Naturally from memory?

A. Except the case of Felix Villanueva.

Q. When you came down there on July the 24th did you take particular notice of the locality of the body of Florentino in the middle of the road so you could be positive now as to where it was located?

A. I located the body; it may have been a foot or two, but I do not think it could vary very much.

Q. I say when you first came down you particularly noticed all these things and fixed them in your mind, did you?

A. Right to the contrary, I did not try to fix anything in my mind.

Q. You took particular notice with reference to the position of the buildings, bodies, and the sentinel?

A. I can not say that I took particular notice.

Q. Then it might vary considerably?

64 A. It might vary some little. I did not put any spot down on the ground; that is just as I remember it.

Q. Then you do not pretend to be correct?

A. No; not at all.

Q. You do not know whether Grafton moved after he fired the shot or not?

A. I do not know what he did after he fired the shots and between the time I saw him.

Q. What were you doing?

A. Sitting down talking.

Q. With whom?

A. Captain Davis.

Q. So you can not testify as to whether Grafton moved and changed his position from the time you heard the shots?

A. I can not testify as to what he did from the time he fired the shots until I saw him.

Q. You had him in your eye all the time did you?

A. There might have been a half a second that I didn't.

Q. And he never moved from the first time you saw him until you arrived.

A. He may have moved a yard either way.

Q. How long was it before you relieved him.

A. Ten or fifteen minutes.

Q. You did not have him in your sight all that time?

A. No.

Q. Who acted as interpreter when you made efforts to get the dying statement of Florentino?

A. A soldier, Private Orenbeck.

Q. What language was he examined in?

A. I do not know. I spoke to the soldier in English and
65 he translated it to him in his own way.

Q. Do you understand Spanish?

A. Very little.

Q. Visaya?

A. None.

Q. Then your statement as to facts and so forth is based upon what the soldier said?

A. Yes.

Q. Did not Mr. Lynch ask any questions when you were there?

A. He may have attempted to do so; he was generally around.

Q. Did he ask any questions and receive any answers while you were present?

A. He may have asked a question or so.

Q. You would not say more than one?

A. Probably not.

Q. Would you say whether he did or not, or could you say?

A. I could say he conducted no investigation within my knowledge.

Q. The question is, Did he ask any questions in your presence or not?

A. I could not say.

Q. Is it not a fact that you told Mr. Lynch that he was on a military reservation, and must be careful what he did there, and that there was a guardhouse on the reservation?

A. I did not put it that way. I told him that I would have to inform him that that was a military reservation and he would have to leave these things to me, and if he did not, I would put him off the reservation or in the guardhouse.

Q. And you threatened to put him in the guardhouse.

A. No; I told him I would do it.

Q. And he told you he was justice of the peace of Iloilo?

A. I believe he did.

Q. Lieutenant Harrel, you testified upon the bearing and manner of the defendant; wish you would tell us what examination
66 you made of his equipment, his rifle, and ammunition when you arrived on the scene.

A. I made no examination of his rifle or equipment.
Q. Did you not have hold of his gun?
A. Yes; but I did not examine it.
Q. Did you not make an examination and find out how many cartridges he had fired?
A. No.
Q. Did not ask him?
A. No.
Q. And did not immediately place him under arrest?
A. No; not immediately.
Q. Is it not a fact that for about a half hour that this defendant was entirely unattended to by you; that you allowed him to remain there; you going about from place to place, paying no attention to him?
A. I do not think it was over fifteen minutes before he was relieved; I do not know, but there was more or less excitement—it might have been ten minutes.
Q. There was considerable excitement there at the time, was there not?
A. That all depends on how you look at it. I do not think there was an overamount of excitement—some.
Q. So much so that you do not remember distinctly what occurred during those fifteen minutes, except that you changed your clothes and went here and there; is that what you said?
A. No.
Q. What did you say?
A. I said I did not remember the exact minutes.
Q. You remember now as to the exact distance between the bodies?
A. I have not said so.
Q. More or less, may be?
A. Yes; from memory.
Q. Then may be is just as accurate as your memory about
67 those other things?
A. Probably so.
Q. Were you particularly calm and cool then?
A. I was not particularly cool.
Q. Were you not considerably agitated and excited?
A. Not in my way of thinking.
Q. How were you dressed at the time you went out of your house?
A. Undershirt, drawers, socks, and a "kimona."
Q. Is is not a fact that very soon after this occurrence in Guimaras, July the 24th, you stated something to this effect: "I'm going to save this man; to see that he not punished for this thing, if I can help it."
A. When am I supposed to have stated this?
Q. Very soon after the occurrence at Guimaras.
Captain NETTLES. I would request that the question be made more definite; to whom he made this statement, and when.

The COURT. He may answer the question.

A. I do not know I ever said anything about saving him; I may have said that he had my sympathy.

Q. Did you at any time say anything to the effect that you were going to do everything you could to save this man, on account of the act he committed that day?

A. No; I never said anything like that.

The COURT. Did you say that you were going to try and save him from punishment for what he did that day, in substance?

A. I may have said that. I recall no particular date of saying it.

Q. As you remember, what was the distance between the body of Felix, the man lying next to the wall, and the body of Castro,
68 lying in the road?

A. Locating the two bodies as I remember the distance I find it about thirty feet.

Q. When you went down there that day did Grafton tell you at what distance he was from Villanueva when he fired at him?

A. He did not express it in the form of feet or yards.

Q. How did he express it?

A. He said about how far Florentino was away from him and said the other was following some distance.

Q. Where you when you heard the last shot fired?

A. Still in my room.

Q. Did you say you saw Grafton from your window before you went out into the road?

A. I did not.

Q. Do you know a man by the name of Muller?

A. Yes.

Q. Sanitary inspector?

A. I do not know; I know Martin Muller.

Q. Do you remember having a conversation with him about this case?

A. Two or three times.

Q. Do you remember one that occurred the day after the shooting?

A. I do not remember.

Q. When was the first conversation you had with him about the shooting?

A. Short while after the shooting, the same day.

Q. Do you remember saying to him in that conversation that Grafton ought to be cleared and you were going to see that he was cleared, in substance?

A. I can not predict what will occur. I may have said he would have my support financially or otherwise.

Q. It is a fact that you said to Mr. Muller that this man
69 ought to be cleared and that you would see that he was cleared?

A. I am positive I did not say that.

Q. What did you say?

A. I may have said that the man ought to be cleared.

Q. Do you remember whether you did say that or not?

A. I do not recall saying it.

Q. Do you not recall anything of that kind?

A. No; my conversation was not along that line.

Q. Did you use those words or say anything to that effect in any subsequent conversation to Mr. Muller, and that you believed that the man ought to be cleared and that you were going to see that he was cleared.

A. Can not say that I did.

Q. To this effect: That it did not make any difference what he had done there, you had made up your mind and were going to see that he was cleared.

A. Positively nothing of that kind.

Q. What was it?

A. I may have said that I, as this man's commanding officer, would give him my support; that I had a conviction that he had acted within reasonable bounds.

Q. You do not remember of saying that?

A. I have no recollection of making such a statement to Mr. Muller.

Q. How long had Grafton been down at the landing as a member of that detachment?

A. I think three days.

Q. The detachment was changed frequently—that is, a man would be brought down and would go back when he had been there about three days?

A. Yes.

Mr. Ross. That's all.

Captain G. H. Davis, after being duly sworn, testified as follows:

70 I am captain of the Twelfth Infantry, stationed at Guimaras.

Questions by Lieut. SHIELDS:

Q. State where you were on July the 24th, 1904.

A. I went from Iloilo to Camp Jossman, passing through Buena Vista, landing at about three o'clock in the afternoon.

Q. While at Buena Vista landing did anything unusual occur?

A. Shortly after arriving at Buena Vista landing, and while I was in the quarters of Lieut. Harrell, two shots were fired in rapid succession. I went to the door of Lieut. Harrel's quarters and saw the sentinel standing between the warehouse of the quartermaster's and that place. A man was lying in the center of the road. I went back and got my hat, and then we went to the place where this man was lying. At the same time Lieut. Harrel and two or three enlisted of the detachment stationed there ran down to the warehouse. As we approached the scene, or I should say either just before or just after the shooting—I have forgotten which—the sentinel called, as nearly as I can remember, "Come on down; they are trying to knife me."

As we approached the scene, and approaching the man lying in the middle of the road, the sentinel said——

Mr. Ross. Object to anything that the accused said afterwards.

Captain NETTLES. That is a part of the res gestae and is admissible.

Mr. Ross. The remarks that the accused made in his own favor, no matter how close to the act, or not admissible, they are incompetent.

The COURT. I understand the res gestae constitutes state-
71 ments made in the act itself, qualifying it. After the act is finished a declaration made by the party can not be considered res gestae. It must be made simultaneously with the act. It is sometimes difficult to distinguish what is a part of the res gestae, but in this instance the captain at the time of the firing was in the house and run a distance of forty or fifty yards, and after his arrival this explanation was made. Now, I think that is not res gestae.

Captain NETTLES. Our purpose is to show by this witness that the accused said at the time that he was attacked by these two natives and he shot them in defense of his life on post. I think this comes within the definition of res gestae, and I think the accused after the shooting said this, and it did qualify it at the time of the shooting.

The COURT. It may be excluded, and you can have the benefit of an exception.

Captain NETTLES. Exception.

Q. How much time elapsed between the firing of the two shots and the time you were in sight of the sentinel?

A. A few seconds.

Q. Can you be more definite than that?

A. Not more than ten seconds.

Q. How much time elapsed between the firing of the shots and the time you arrived on the scene of the shooting?

A. Not more than half a minute.

Q. Were you the first on the scene of action?

A. I do not know; three or four others arrived about the same time.

Q. Will you state to the court what you saw when you arrived there?

A. I saw the sentinel standing on the north side of the
72 road towards the northern storehouse and a Filipino lying in the center of the road between the storehouses, and another Filipino lying against the southernly storehouse, near the point where the bullet marks are.

Q. Where in relation to the point where the bullet marks are was the man you stated that was lying in the middle of the road?

A. The wounded man in the middle of the road was about 15 or 20 feet from those holes, in the middle of the road, slightly to the east of a line drawn north and south through those holes.

Q. Which direction is east?

A. Towards Camp Jossman.

Q. Does that road run east and west practically?

A. Very nearly, I think.

Q. Where was the sentinel standing when you first saw him in reference to the position of these two natives?

A. He was standing closer to the north storehouse and almost in a line with the second man.

Q. How was the native in the middle of the road lying?

A. On his back.

Q. In what direction were his feet?

A. Towards Camp Jossman.

Q. Were his feet towards the sentinel?

A. Yes.

Q. From the time you first saw this native until the time he was removed did he move from the location you first saw him?

A. He made one or two attempts to arise, but he could not move his feet or legs.

Q. How far were these two natives to the east of the two westerly doors in the two warehouses?

A. About 20 or 25 feet.

73 Q. Taking a line at right angles at the point where those two bullet holes are from the storehouse, what side would it be on?

A. On the east side of that line.

Q. You say you heard two shots. Can you state positively of your own knowledge whether there were more or less than two shots?

A. I heard two shots. I think I would have heard them had there been any others.

Q. How far were you from the place where the shooting occurred at the time of the shooting?

A. About 50 yards.

Q. What were you doing at the time the shots were fired?

A. Sitting in Lieut. Harrell's quarters talking to him.

Q. Were the sounds of the shots clear and distinct?

A. Clear and distinct.

Q. Did you see any weapon in possession of anyone other than the sentinel there at the post?

A. I saw a knife lying near the man who was in the middle of the road.

Q. Where was the knife in relation to the location of the man?

A. Quite near him and near to his right foot.

Q. Can you state whether or not this is the knife [showing him Exhibit A]?

A. The knife looked like this. I think this is the one.

Q. Was the knife in the same condition then as it is now?

A. It has become rusty, otherwise the same, and it has a mark on it it did not have then.

Q. After the shots and up to the time you arrived on the scene of the shooting did you see any natives near or about that locality?

A. No, except the two wounded men.

74 Q. In going from Lieut. Harroll's house to the scene of the shooting were you or not able to look down the road towards the pier?

A. I was able to look down that way.

Q. Did you or not look down that way?

A. I do not remember whether I looked down that way; a few seconds after I arrived I looked that way.

Q. Were there any natives near or in sight?

A. I did not see any.

Q. Do you know where the bullets of the two shots went, if so state where?

A. The marks on the storehouses showed that two bullets had gone through the wall of the storehouse about 2 inches apart. One of them struck the platform scales. I do not remember where it went after that. The other struck a chair near the scales and from there went into a rail that was used to partition off the space used for the office. I did not follow it any further.

Q. After you arrived at the scene of the shooting, how long did you remain there?

A. A very short time, not more than five minutes.

Q. Did you see the accused during the time you were there?

A. Yes.

Q. Where was he?

A. Standing in the road between the two warehouses, as I approached; afterwards he came near to the doors of the warehouses, and a number of other men were formed in a line by Lieut Harrell.

Q. Going back to the course of the two bullets, taking that same line which the judge indicated perpendicular to the wall of the south storehouse, what was the course of the bullet to the east or west of that line after it entered the warehouse?

A. To the west of that line.

75 Q. In other words, from what direction at the point of entrance in the warehouse were the shots fired?

A. They were fired from the northeast of this point of entrance.

Q. What was the manner of the accused when you arrived at the scene of the shooting?

A. He was apparently very alert, was slightly excited, but at the same time conducted himself in a manner that showed he was clear-headed and ready for the performance of his duty.

Cross-examination by Mr. Ross:

Q. There was no indication of his having been drunk?

A. None whatever.

Q. You would say from his manner that he was in a condition of mind to know what he was doing and acted with deliberation and intelligence?

A. Yes.

Q. When you went to the shooting did you go in company with Lieut. Harrell, before or after?

A. About the same time; could not say whether before or after.

Q. When you heard the shots, I understand you to say, you went out to the door and looked and then returned and got your hat?

A. Yes.

Q. When you heard the exclamation of the accused, "Come here they are trying to knife me," was that before or after the shots were fired?

A. I do not remember.

Q. When did you first see Grafton?

A. When I went to the door after the shots were fired.

Q. Then you went back and got your hat?

A. Yes.

Q. And when you came back was he in the same place?

A. Yes.

76 Q. When you arrived at the scene?

A. He remained standing in the same place until we arrived, as I remember.

Q. As you recollect, he did not change his position any time after the shots were fired until you arrived there?

A. No.

Q. What would you say the distance was between Grafton when you saw him and the body of the man lying against the wall of the warehouse?

A. About thirty feet.

Q. What would you say the distance was between Grafton and the body of the man lying in the middle of the road?

A. Ten or fifteen feet.

Mr. Ross. That's all.

Captain F. S. HUTTON, witness for the defense, after being duly sworn, testified as follows:

Questions by Lieut. SHIELDS:

I am captain, 12th Infantry, stationed at Guimeras.

Q. Have you in your official capacity had anything to do with the killing of the two natives by Homer E. Grafton, Co. G, 12th Infantry?

A. I have acted as judge-advocate of the general court-martial for the trial of the soldier for this offense.

Q. In the performance of your duty as judge-advocate of that court did you or not make any investigation of the alleged offense?

A. I did.

Q. Did you make an investigation of it at Buena Vista?

A. Both at Buena Vista and the Buena Vista Landing.

Q. What investigation did you make at the Buena Vista Landing?

Mr. Ross. Object to the question as irrelevant and immaterial.

The COURT. Could you not come to the point by asking the witness if he was present at the time the quartermaster's employes were lined up?

77 A. I was present; I caused them to be lined up.

Q. Tell when that was and what occurred at the time.

A. I can not give the exact date of this, but some time, probably

ten days or two weeks, after the shooting. I caused all the quartermaster employees to be gathered together in one of the storehouses and lined up so that I could talk to them. The day was very rainy and they were all there and not at work, it being easy to collect them. I had to use an interpreter for most of my talking, although I understand how to talk Spanish. The object of lining them up was to see if any of them knew anything about the shooting of these two natives; if they were present or near by, where they were, and if they knew anyone that knew anything about it. I could get very little information from them.

Q. Tell what was done there.

A. They were asked what I have already stated; that is, if they knew anything about this shooting or knew anyone that knew anything about it.

Q. Were the men lined up?

A. Yes; I was in front of them with Lieut. Harrell, and I believe Mr. Falvey was present.

Q. Who did you talk to?

A. I understand Spanish, and talked to those that understood Spanish, and those who did not understand Spanish I had it interpreted to them in Visaya.

Q. And you got no information?

A. Yes; the fact that these natives had a knife in their possession. Whether or not the two native witnesses in this case were present I do not know, but no one made any statement to me there that he was present and saw the commission of this offense, and the question as to whether or not they had been there or saw it was repeated to them two or three times.

78 Cross-examination by Mr. Ross:

Q. Did you talk personally with each one of these men, or generally to all?

A. I talked personally with some of them where they showed a disposition to talk or give any evidence, and the question as to whether or not they knew anything was addressed to all of them.

Q. About how many men were there?

A. Somewhere between 30 and fifty.

Q. Do you remember if you talked personally with these two men?

A. I did not know the two men; one I have seen and the other I do not know.

Q. You testified that you were judge-advocate in this military court that tried Grafton?

A. Yes.

Q. Did you have any conversation with him about this before the trial?

A. Yes.

Q. Is it not a fact that he told you there were two native companions of the two natives killed?

A. No; he made no statement as to that fact.

Q. When did you talk with the presidente?

A. Some time between the commission of the shooting and before the trial—whether it was a week or two days before I do not know. I should say about the 5th or 10 of August.

Redirect examination by Capt. NETTLES:

Q. For what purpose did you have an interview with the presidente of Buena Vista?

A. For the purpose of learning of any information regarding the shooting of these natives or of any witnesses of the shooting.

Capt. NETTLE. That's all.

79 SANTOS ESPINOSA, witness for the defense, after being duly sworn, testified as follows:

I am 22 years old, single, employee of the quartermaster's at Buena Vista.

Questions by Lieut. SHIELDS:

Q. How long have you been employed by the quartermasters at at Guimeras?

A. More than two years.

Q. Do you know Ambrosio Obadilla?

A. Yes.

Q. Do you know Macario Orbe?

A. Yes.

Q. Do you know what their occupation was during the month of July of this year?

A. Yes.

Q. What?

A. Boatsmen.

Q. In whose employ?

A. Quartermasters at Buena Vista.

Q. Do you know Capt. Hutton, of the 12th Infantry?

A. Yes.

Q. Were you present or not in one of the camarines when Capt. Hutton made an examination, or asked questions of the quartermaster employees?

A. Yes.

Q. Did he have an interpreter?

A. Yes.

Q. Who was it?

A. He had me for his interpreter.

Q. Can you state whether or not Macario Orbe and Ambrosio Obadilla were present at that time?

A. Yes; they were there.

Q. Did you, at the direction of Capt. Hutton, have any conversation with these two men in regard to the shooting of
80 the two natives of Buena Vista by the soldier of the 12th Infantry, named Grafton?

A. Yes.

Q. What was that conversation?

The COURT. You had better take them separately

Q. What conversation did you have with Ambrosio?

A. I was instructed by Capt. Hutton and lieutenant to tell these men to tell the truth if they knew anything about this matter, and I asked Ambrosio if he knew anything, and he said he did not.

Q. What conversation did you have with Macario?

A. I asked him if he saw the shooting of these two men, and he said that he knew nothing about it.

Q. Did Ambrosio ever at any time say to you that he saw the shooting of the two natives by the soldier?

A. He told me then that he did not see the shooting and he did not talk to me after that.

Q. Have you ever had any conversation with Macario about the shooting since that day in the camarine?

A. No.

Cross-examination by Mr. MONTINOLA:

Q. Where were you when this shooting occurred on July 24th of this year?

A. In the morning I was on the dock.

Q. And in the afternoon where were you?

A. At 2 o'clock in the afternoon I went to my home for dinner.

Q. When did you leave your house again?

A. At 2.30 p. m.

Q. Where did you go?

A. Went home to have dinner at 2.30 and heard two shots fired at about 3 p. m.

Q. How many persons were in the camarine when Capt. Hutton made the investigation?

A. I do not know; I did not count them—16 or 18.

81 Q. Is it not true that you were not present at the examination at all, but you came in afterwards and ordered the men to go out to work?

A. I got them together and asked them the questions.

Q. What persons made statements on that occasion?

A. Alfonso Remos, Alejandro, Toribio, Felix Daza; I don't remember the others now, because changes were weekly in the quartermaster's department.

Q. But those persons you have named you remembered were the only ones that made any statement on that occasion.

A. Others made statements, but I do not remember their names.

Q. Do you understand English?

A. Oh, a little.

Q. Those persons you have referred to speak English?

A. No; but I talked Visayan to them.

Q. But do you understand English very well?

A. No; but the questions were put to me in Spanish.

Q. Who put the questions to you in Spanish?

A. Captain Hutton.

Q. Is it not true that you did not ask each one of those laborers there if they knew anything about this case, but just put the question to all of them.

A. I lined them up and told them to tell truthfully what they knew about this case; the question was put to each of them, but it was the same question.

Q. How many Filipino employees were lined up there?

A. I was not able to count them.

Q. Is it not true that when you put this question in general to them the only one that answered was Felix Daza?

A. All of them answered that they knew nothing about it.

Q. In what way were these answers given from all of them?

A. I told all of them to tell if they knew anything about the shooting, and they answered, "I do not know."

Q. What did Felix do?

82 The COURT. It does not matter. The only point is to find out if these two men said that.

That's all.

F. D. WICHAM. Witness called for the defendant, after being duly sworn, testified as follows:

I am captain, 12th Infantry, U. S. Army.

Questions by Lieut. SHIELDS:

Q. Where and on what duty have you been on since your arrival in the Philippine Islands?

A. I have been on duty at Camp Jossman, in command of Co. G of the 12th Infantry.

Q. State the date of your arrival?

A. April 3rd, 1904.

Q. Do you know Homer E. Grafton?

A. I do; private Co. G, 12th Infantry.

Q. How long have you known him?

A. Since some time last year, when he joined the company at Salt Lake City, on our way to the Philippines.

Q. Was he under your personal observation from that time until July 24th, 1904?

A. He was always a private in my company.

Q. What can you state as to his character?

A. So far as I know him his character has been excellent. I considered his character better than the average man. He had been attending the school for noncommissioned officers, and I had intended to make him a corporal.

Q. What can you say to his character as to sobriety and steadiness?

A. So far as I know I have never heard or seen Private Grafton under the influence of intoxicants since he has been in my company. He is a soldier I would put absolute confidence in in the field and out of the field.

Q. Please state whether or not this opinion of Private Grafton was formed before or after July 24th, 1904?

83 A. It was formed before July 24th, on account of characteristics shown by him.

Q. Since you have been in command of Company G of the 12th Infantry has he ever been on trial for anything?

A. No.

That's all.

Sargeant E. PROPST, witness for the defendant, after being duly sworn, testified as follows.

Questions by Lieut. SHIELDS:

Q. Where and on what duty were you on July 24th, 1904?

A. I was senior noncommissioned officer in charge of Buena Vista.

Q. Do you know the accused, Homer E. Grafton?

A. I do.

Q. Was he a member of your detachment at that time?

A. Yes.

Q. On what duty was he that day?

A. On guard.

Q. Can you state what relief and what hours?

A. He was on first relief, from 8 to 10, then from 2 to 4.

Q. Did anything unusual occur on July 24th?

A. The shooting of the two natives.

Q. State what you know concerning the shooting of these two natives?

A. I know very little; I know nothing.

Q. What called your atention to it?

A. The shots.

Q. How many shots?

A. Two.

Q. Where were you when you heard the shots?

A. In the quarters.

Q. What part?

A. Kitchen.

Q. How far, approximately, from the two storehouses?

84 A. I would judge about 100 yards.

Q. What were you doing at the time?

A. I think nothing. I had been in there with the cook, pealing some potatoes, but at the time the shots were fired I was doing nothing.

Q. Were you awake?

A. Yes.

Q. Can you state positively whether or not there were more than two shots?

A. There were just two.

Q. At or about the time of the firing of the two shots did you hear anything else?

A. No.

Q. What did you do when you heard the shots fired?
A. Ran out of the quarters to see what it was.
Q. What did you see and what did you do?
A. When I got out of the quarters I looked up the street toward the storehouses and saw men running down there and I went also. I saw two natives lying in the street, and lieutenant was talking to Grafton.
Q. How long after you heard the two shots was until you arrived at the scene of the shooting?
A. Could not say; I suppose probably a few seconds, a minute or not so much.
Q. Where were the two natives lying with relation to the two storehouses?
A. One was up against the south side of the south storehouse and the other was lying in the middle of the street between the storehouses.
Q. Where between the two storehouses in reference to the east and west ends of the storehouses?
A. They were a little east of the middle of the storehouse.
Q. Were they both on line?
A. If I remember right, the one against the storehouse was a little to the right of the other.
85 Q. Do you know where the bullet holes are?
A. Yes.
Q. Taking a line at right angle from the wall across the street where were they?
A. They would be a little east and a little towards the camp.
Q. How much?
A. Not very much; I do not exactly know.

Cross-examination by Mr. Ross:

Q. How many men were in the quarters that day?
A. Twenty-four.
Q. How long did you say it was before you arrived on the scene after hearing the two shots?
A. Something less than a minute.

Corporal JAKE REITER, witness for the defense, after being duly sworn testified as follows:

Q. Where and on what duty were you on July 24, 1904?
A. Corporal of the guard on the beach at Buena Vista.
Q. Do you know Private Homer E. Grafton?
A. Yes.
Q. What relief did Grafton belong to?
A. Number one.
Q. What hours of the day was he on post?
A. From eight to ten and from two to four.
Q. Where was post No. one?
A. Extended in front of Lieut. Harrell's quarters up as far as the coal pile in the daytime and at night every half hour to the dock

Q. Did anything unusual occur on July twenty-fourth?

A. I went to the water-closet just before three and just as I came out there was a step leading to the guard room, at which point I heard two shots; so I grabbed my piece and ran up there and heard Grafton call for the guard. Grafton was on the north side of the road, next to the storehouse, and one of the men wounded was lying in the center of the road between Grafton and the other man
86 against the building on the south side of the road.

(Showing witness Exhibit A.) Is that the knife you saw?

A. Yes.

Q. How was the condition of the knife with reference to its present condition?

A. Looked a good deal the same.

Q. You say you saw this knife lying between the native in the center of the road and Grafton?

A. Yes. A soldier by the name of Faver picked it up and handed it to the lieutenant.

Q. When you heard those two shots fired did you hear anything else at approximately the same time?

A. No.

Q. Did you hear any call by the sentinel at that time?

A. When I got close to him I heard him say, "Hurry up the guard."

Q. How far were you from where the two natives were lying when you heard the shots?

A. About a hundred yards.

Q. How long after the shots were fired before you were outside of the building and in sight of these two natives?

A. I was outside at the time of the firing, but I jumped upon the porch, grabbed my gun, and ran out there.

Q. How much time after the shots before you were in sight of Grafton and the two natives?

A. Immediately afterwards.

Q. Can you state definitely how many seconds?

A. Two or three seconds, probably.

Q. Was there any change of position of the two natives from the time you first saw them and the time that you arrived at the spot—I do not mean their position of body, but their position with reference to the ground.

A. I believe the man shot through the body was reeling and the other was lying up against the wall.

Q. Can you state positively whether there were two or more shots fired?

87 A. Two shots were all I heard.

Q. What was the position of Grafton and the two natives with reference to the two storehouses?

A. Grafton was on the north end a little toward the east, and the natives, one lying in the center of the road and the other lying up against the wall.

Q. Did you see where the bullets entered the storehouse?

A. Yes.

Q. Where was the native in the middle of the street lying in relation to the bullet holes and in relation to where Grafton was standing?

A. I think he laid a little westward, not exactly in line with the sentry.

Q. I wish to know where the native in the road was in relation to the entrance of the shots in the storehouse and where Grafton was standing.

A. The man was lying up against the building on the south side and the other man lay a little westward.

Q. Which way is west, toward the beach or the other?

A. Toward the bay.

Q. Now, suppose a line was drawn from the shots in the south storehouse straight out from the building—that is, perpendicular—where was the native lying, to the east or to the west of that line?

A. To the east.

Q. Suppose you drew a line from where the sentry stood to those holes, where was the body in the middle of the road with reference to that line?

A. A little to the left of that line.

Q. How much do you think?

A. Three or four feet.

Q. If you drew a line at right angles to the wall of the south
88 storehouse across the street to the bullet holes, was the body of the man who lay in the street to the west or to the east of that line?

A. To the east of that line.

Q. How much do you think?

A. Cannot say exactly.

Q. What was the general manner of Grafton when you arrived on the spot?

A. He looked pale; I did not pay much attention to him.

Q. Did he act as though he knew what he was doing?

A. I think he did.

Q. Before this incident happened was there any talk among the enlisted men of the detachment concerning the conduct and bearing of the natives at Buena Vista at that time?

Mr. Ross. Object to the question as irrelevant and immaterial; it has no bearings on this case. Any conversation that might have occurred between the men on that day has no bearing on the case.

Captain NETTLES. It should be taken into consideration in ruling upon this point that the soldier was on duty in a military post in a strange country, making it impossible for him to be personally acquainted with all these natives. He did not know of any specific threats on the part of these natives, but it would be reasonable to suppose that such could have been conveyed to him and under these conditions I submit that the acts unusual on the part of the natives

generally in and around that post sufficient to put a guard upon the alert and commented upon specifically at the same time, is more than competent in examination of the conduct of the accused.

The COURT. I am inclined to believe the question you have made is too broad; in any event I think that if any act had been observed by the defendant to lead him to suppose he stood in danger of assassination, or if any facts had been communicated to him by his
89 superior officer that would lead him to think that a scheme might be on foot to assassinate him at that time, such would be received. That will arise in the determination of this question, the question of this man having acted within line of duty and prudence and with due regards to the rights of others. I think I will hear this testimony.

A. In the morning we were sitting in the guardroom and talked about Samar.

The COURT. Just tell what talk you had with him.

Q. What talk about the people in that vicinity and their actions with the defendant?

A. There were a great many people leaving on boats and more soldiers than usual.

Q. Can you not remember whether you and the accused had any particular talk that morning relative to the attitude of the people at Buena Vista and any unusual acts on their part?

A. Nothing more than people leaving there.

Q. Did the accused make any comments to you in relation to the people leaving or any other acts of the natives on that day?

Mr. Ross. I think the question is legal.

The COURT. You can tell whether there were any remarks between you and the accused about the condition of affairs there and the acts of the people.

A. Nothing, only they looked suspicious.

Q. What did he say and you say?

A. We were talking about Samar was all I know.

Q. Leave out the Samar attack and tell what was said about the people at Buena Vista.

A. He said nothing to me.

Q. What did you say to him?

A. I was not talking to him; we were all talking together.

Q. Was he present?

A. Yes.

90 Q. There while you were discussing Samar?

A. Yes; there was nothing else said that I remember of.

Cross-examination by Mr. Ross:

Do you remember the position in which the body of the man lying in the road was as to whether on his back or side?

A. Reeling, swaying on his side; not exactly rolling over, but just to and fro.

Q. Was he on the ground or partly rising?

(Question withdrawn.)

Q. Was he sitting up?
A. No.
Q. What direction did his feet point?
A. To the eastward.
Q. You said a while ago in your testimony west; you mean toward the bay.
A. Yes.
Q. And he was lying west of a straight line drawn between Grafton and the bullet holes; that is on the side toward the bay.
A. Yes.
Q. Did you see the knife on the ground yourself?
A. Yes.
Q. How near was it to the man?
A. Between Grafton and the man lying on the ground.
Q. How near, which one was it nearest to?
A. I can not say exactly; I just saw it lying there.
Q. How many had arrived there before you did?
A. Lieut Harrell and Captain Davis got there a little ahead of me. Faver and myself got there afterward.
Q. How far had you gotten toward the sentry when he hollowed "Hurry up the guard?"
A. Probably ten yards.
Q. Before that, did you hear him make any outcry?
A. No.
Q. Did you hear him cry out anything except what you have said?
91 A. No.

Corporal C. A. TREADWELL, Co G, 12th Infantry, after being duly sworn, testified as follows:

Questions by Captain NETTLES:

Q. Were you on duty on July 24th, 1904?
A. Corporal of the guard, Buena Vista.
Q. Do you know Private Homer E. Grafton?
A. Yes.
Q. Was he a member of your guard that day?
A. Yes.
Q. What relief did he belong to?
A. First.
Q. Did you in your official capacity as corporal of the guard place him on post in the afternoon of July 24th?
A. Yes.
Q. Did anything unusual occur on that afternoon?
A. Yes.
Q. What happened?
A. Two natives were shot.
Q. Where were you when this shooting took place?
A. In the storehouse.

Q. Which storehouse?

A. One on the south side of the road.

Q. How far were you at the time of the shooting from the position where the two natives were found after you went out of the door?

A. I should judge about fifteen feet from one and about five or six feet from the other.

Q. Do you know who did the shooting?

A. No.

92 Q. How many shots were fired?

A. Two.

Q. Are you sure there were only two shots?

A. Yes.

Q. Can you state positively whether there more or less than two shots fired?

A. There were only two shots fired.

Q. At or about the time of the two shots, did you hear an outcry of any kind?

A. No.

Q. Right at the time of the shots did you hear an outcry?

A. I heard him say something, but could not say what it was—it was indistinct.

Q. What did you do after you heard the two shots?

A. I came out of the storehouse.

Q. Which door did you come out of; one to the east of Lieut. Harrell's quarters or the one towards the west, toward the beach?

A. The one toward the west.

Q. When you came out, what did you see?

A. I saw two natives lying on the ground who had been shot.

Q. How long after the two shots were fired was it before you got out of the door?

A. About a minute.

Q. How did it happen that you did not get out sooner?

A. I was awaiting developments; I thought in case of any more trouble I would get something to protect myself.

Q. When you got out of the door, were the two wounded natives to the east or west of the door?

A. East of the door; one about six ft. and the other about 10.

93 Q. Do you know where the two shots went?

A. To the east of the door through the corrugated iron, about two feet from the ground.

Q. Where was the native nearest to the door lying with reference to the bullet holes?

A. I do not know.

Q. Can you tell if he was near?

A. Yes; near the wall.

Q. Was he east or west, or just opposite to the bullet holes?

A. West of the bullet holes.

Q. Now, the native in the middle of the road; where was he with reference to the bullet holes, to the east or west?

A. East of the bullet holes a trifle.

Q. Where was Grafton?

A. A little to the west and towards the pier from the natives.

Q. From what natives?

A. The one in the road and also the one against the wall.

Q. Was there anybody else there at the time?

A. Just as I came out Lieut. Harrell came out.

Q. Did he arrive before or after you?

A. At the same time.

Q. What was Grafton doing when you first saw him?

A. Standing near the center of the road, facing a southeasterly direction.

Q. Who was the nearest to Lieut. Harrell's quarters, the natives or Grafton?

A. The native lying against the storehouse.

Q. How long had you been in the storehouse before the two shots were fired?

A. About one-half a minute, I should judge.

Q. Where did you come from?

A. The guardhouse.

94 Q. Did you see Grafton while you were coming from the guardhouse to the storehouse?

A. Yes.

Q. Where was he?

A. I passed him on his way down to the storehouse about one-half way between Lieut. Harrell's quarters and the storehouses.

Q. Did you have any conversation with him?

A. Yes.

Q. Did Grafton in the line of duty make any report to you?

A. Yes.

Q. When did he make this report?

A. While I was going down to the storehouse.

Q. How long before the shooting?

A. About 3 or 4 minutes, I should judge.

Q. What was that report?

Mr. Ross. Object on the same grounds as before.

A. He reported to me that he saw two men get out of a boat, near the beach, who had bolos on them, and that they crossed his post and went up the hillside, and if I did not report the matter to the commanding officer he would when he came off post.

Q. Did he report anything else relative to the conduct of the natives in and about Buena Vista at that time?

A. He said things looked very suspicious around there and a good many natives were leaving town.

Q. At that same time?

A. Yes.

Q. What was the manner of Grafton when you saw him immediately after the shooting?

A. He seemed agitated and nervous when I came out of the storehouse.

Q. Did he appear as though he knew what he was about?

A. Yes.

95 Q. When you saw Grafton and he made that report, which way was he going on his beat?

A. He walked with me down toward the storehouse.

Q. Where is the door you came out of, the one just this side of the bullet holes?

A. Yes.

Q. You say the door was shut and fastened inside?

A. It was locked. I unlocked it when I went inside.

Cross-examination by Mr. Ross:

Q. You left it open?

A. I shut it.

Q. Grafton knew you were inside of the house?

A. Yes.

Q. And when you first saw him he was standing nearer to the bay than to the man lying in the middle of the road?

A. Yes.

Q. To the west of the door?

A. Yes; toward the west of the natives.

Q. With reference to the door, where was he, on the side towards the bay, or Lieut. Harrell's quarters?

A. Almost opposite.

Q. How far was he from the corner of the building nearest the bay?

A. I could not say, exactly. I do not recollect how far it is from the door on the west end.

Q. The questions is how far was Grafton from the end of the building when you saw him?

A. Some 15 or 20 ft.

Q. Did you hear him order these natives to halt before he fired upon them?

A. No; I did not hear anything distinctly.

Q. How many men were there on guard that day?

A. 6 privates and 2 noncommissioned officers.

Q. How many men in the detachment?

A. 24, I believe.

96 Q. I understand you took no action on the remarks Grafton made to you about the two men with the bolos?

A. No.

Q. Did not pay any attention to it?

A. Yes; but I did not have time to take any action.

Q. What day of the week was that?

A. Sunday.

Q. Is it not a fact that on Sunday there is a great deal of moving there, the natives going to the cockpit?

A. A great deal of travel on that day.
Q. Is there not generally on Sunday?
A. Cannot say.
Q. Did you not observe on Sunday a great many people coming over to Iloilo?
A. Never had occasion to observe anything only on that day.
Q. Is it unusual to see natives with bolos?
A. Yes; except working bolos.
Q. Yes; but is it not quite common to see natives going around with working bolos?
A. Yes.
Q. How far was that from the company's quarters?
A. I should say 110 to 115 yards.
Q. Is it not a fact that immediately after the shooting the most of the men came to the scene?
A. Yes.
Q. How long after the shots were fired before they arrived?
A. About a minute; it might have been less.
Q. Are you acquainted with the location of the barrio of Salog?
A. No.
Q. Do you know a little barrio there north of the bay?
A. I know there is a barrio around the storehouse.
Q. Is there a little barrio up there near the soldiers' quarters, not a great distance from their quarters, moving up the hill?
A. No.
97 Q. You know where Buena Vista is?
A. Yes.
Q. Is it not true that this road in which the shooting occurred is the road commonly used by the people passing from Buena Vista down to the water front?
A. Yes.

Redirect examination by Capt. NETTLES:

Q. How long did you say you had been in the warehouse before the shots were fired?
A. 3 or 4 minutes.
Q. After you went in the door how were the shots fired?
A. 3 or 4 minutes.
Q. From what direction did you come?
A. From the guardhouse.
Q. Were you walking toward the pier or dock?
A. Yes.
Q. Did you look in that direction as you walked up there?
A. No; do not remember that I did.
Q. Did you see any natives on the road?
A. No.
Q. You have stated you came out of the building about a minute after the shots were fired?
A. Yes; or less.
Q. Who were there besides Grafton and the two natives?

A. Just as I came out Lieut. Harrell and Sarg. Reiter and some members of the guard were coming up.

That's all.

Private SAMUEL BENNETT, Co. G, 12th Infantry, after being duly sworn, testified as follows:

Questions by Captain NETTLES:

Q. Where and on what duty were you on July 24, 1904?

A. Attached service, Buena Vista.

Q. On what duty were you on that date?

A. Guard.

Q. What relief did you belong to?

A. Second.

98 Q. What time were you on duty in the morning?

A. From ten to twelve.

Q. Did anything unusual occur that day?

A. First about eleven thirty, I was walking post and walked down to the coal pile. Two men came and told me that two natives down there on the dock wanted to fight with bolos; and I said if they do I will put them in the guardhouse. These men went away and came back with a bolo concealed, the handle of it sticking out of their clothes. After he passed me I followed him, thinking there would be trouble. They noticed me coming down and I got within about thirty-five yards and loaded the chamber of my gun and put in shells. They saw me and went around behind the house. I went down on the lower dock and at that time they were all out of sight. I walked around to where I could see them and asked them what they were doing there with bolos. They said they did'nt have any bolos, but I told them I had seen them with bolos. I chased them off the dock and looked around for the bolos, but could not find them. I don't know what they did with them unless they threw them in the bay.

Q. Did you tell Grafton about this before he went on duty that afternoon?

A. Yes; just as soon as I went off post.

Q. What was said, if anything, between you and Grafton concerning the suspicious actions or otherwise of the natives of Buena Vista?

A. We were talking about the natives how they were going away that day. There would be a lot of women leave, going toward Iloilo and a lot of men come back.

Q. Where were you when the shooting took place?

99 A. In the guardhouse.

Q. Did you hear the shots?

A. Yes.

Q. How many?

A. Two.

Cross-examination by Mr. Ross:

Q. You say you chased these men off the dock?
A. Yes.
Q. And you were not afraid of them?
A. No.
Q. And you chased the whole five of them off?
A. No; they went off when I told them to.
Q. How long had you been in Buena Vista before July 24th?
A. Three days.
Q. Had you ever been there on Sunday before?
A. No.
Q. What did you do when you heard the shots?
A. I got up and opened the door about the time the shots were fired. I heard some noise and looked out and saw the man. Came back, got my gun and went down there.
Q. Where were these men when you went down there?
A. One against the storehouse and the other in the road.
Q. How far in the road?
A. A short distance.
Q. Where was Grafton?
A. About six feet from the man lying in the road.
Q. On what side of the man lying in the road?
A. Grafton was nearer the guardhouse.
Q. How far.
A. About six or eight feet.
Q. From the man.
A. Yes.
That's all.

100 EDWARD J. LITTLE, Co. G, 12th Infantry, quartermaster-sergeant, after being duly sworn, testified as follows:

Questions by Captain NETTLES:

Q. How long have you been q. m. sergeant Co. G?
A. Three months.
Q. What was your position prior to that time?
A. First sergeant.
Q. Do you know Private Homer E. Grafton?
A. Yes.
Q. How long have you known him?
A. Since February, 1904, when he joined us in Salt Lake City.
Q. What do you know as to his character?
A. It is excellent. When I was first sergeant, I knew Grafton, and his reputation was that of a man who never drinks. I always mixed up with the men, and if he had taken anything or shown any effects of it I would have known it.

Cross-examination, Mr. Ross:

Q. Do you regard him as a steady man?
A. Yes; one of the steadiest in the company. He is a man that is

a man. You can trust him with any duty. He will carry out any orders given him.

Q. Do you consider him a man that would act with judgment and deliberation?

A. Yes.

Q. Do you consider his conduct on that occasion such that would indicate he did not possess the ordinary amount of courage?

A. No.

101 Q. What has been your observation as to that?

A. If I had been called out and in an attack I would have put him one of the first.

Q. And you regarded him as a man of more than ordinary firmness?

A. I regarded him as a man I could trust, and would like to have him on detail at any time, and he would not get rattled.

Q. You estimated his character as being steady, calm, and courageous?

A. Yes.

That's all.

Private HOMER E. GRAFTON, defendant, takes the stand in his own behalf, and after being duly sworn testified as follows:

The COURT. You are not compelled to testify in this case, but whatever proper questions are asked you you will be compelled to answer.

Questions by Captain NETTLES:

Q. What is your occupation?

A. Soldier.

Q. What company and regiment?

A. Company G, 12th Infantry.

Q. Where were you born?

A. Illinois.

Q. Where were you on July 24th, 1904?

A. Buena Vista landing.

Q. State what duty you were doing on that day.

A. Guard duty.

Q. What relief of the guard?

102 A. Number one.

Q. What was your post?

A. Number one.

Q. Describe that post.

A. The post extended from the hydrant to the coal pile in the daytime and from the hydrant to the coal pile at night and every thirty minutes to the pier and around to the storehouse.

Q. What difference, if any, is there in the path of post No. 1 as walked on July 24th and as walked at the present time?

A. There is considerable difference.

Q. Describe it.

A. The post as it is to-day is walked up and down the middle of the road as existed on July 24th from the east end of the storehouse to Lieut. Harrell's quarters, it was on the left of the road facing

toward the coal pile. The path was off the road because the road is of hard gravel, the path being on the left hand side.

Q. Until it reached the storehouse, how did it continue?

A. There were first stones. The prolongation of this road that was built down to the storehouse was of crushed stone. I walked to this corner of the storehouse and then went across these crushed stones.

Q. How many feet did the prolongation of the path run towards the storehouse?

A. About six feet.

Q. Starting at Lt. Harrell's quarters and coming toward the beach, would you come on the right or left side?

A. To the left hand side.

103 Q. What suspicions or peculiar actions, if any, did you observe on July 24th on the part of the natives in and around Buena Vista?

A. I noticed a number of the natives were leaving the town, and their general appearance as they moved around was rather suspicious.

Q. Did you make any report to the sentinel relieving you the conditions and observations you had made?

A. Yes; to the corporal of the guard.

Q. At what time?

A. After I was on post at two o'clock, along towards three in the afternoon, he came from the quarters going toward the storehouse and I was coming from the end of my post. When I met him I reported what I had seen.

Q. Upon going on guard that day were the sentinels posted with or without bayonets?

A. I do not know; it was left to their discretion.

Q. When you went on guard at two o'clock did you have your bayonet?

A. No.

Q. When you went on your post at eight in the morning did you load your piece or not?

A. No.

Q. Did you fill in your magazine in the morning?

A. No.

Q. When you went on at two o'clock did you fill your magazine or load your piece?

A. Yes.

Q. You are charged in this case, as you are aware, with the killing of Felix Villanueva. State in detail all that transpired in relation to the shooting of this native.

A. I was at the east end of my post about starting to the west post. I arrived at about half way between Lt. Harrell's

104 quarters and the storehouse. Two natives came out on my post about half way between the storehouse and the coal pile on the left. They had climbed over the stone wall and passed over my post. They advanced directly toward my post. When I arrived

at the corner of the storehouse they were about the corner of the same storehouse at the other end. Just as I started to cross those stones, a native reached in his bosom and pulled out a knife and immediately he changed the handle and concealed the knife upon his arm from my view. Upon seeing that I looked back toward the building on the right on the road coming toward the dock and upon getting near the building they had arrived at a place to my left. Upon gaining this position, the native turned the knife with the point toward me and made a rush at me. At the same time the other native followed close to him. At the time he did this I brought my piece to my shoulder, threw a cartridge in the magazine and fired at him. The other native jumped back toward the quartermaster building. I loaded my rifle and fired at him. Immediately after firing at the second native I hollowed for the guard. As soon as I hollowed for the guard I looked down in the direction the guard was coming from.

Q. Did you see any other natives in sight at the time?

A. No.

Q. How many shots did you fire?

A. Two.

Q. Are you positive about the number of shots you fired?

A. Yes.

Q. Which native did you shoot first, the one in the middle of the road or the one near the storehouse?

A. The one in the middle of the road.

105 Q. Which one had the knife?

A. The one in the middle of the road.

Q. How close was he to you when you fired?

A. About four paces.

Q. How near was he to you when he fell?

A. Not over five paces.

Q. How near did the knife drop to you?

A. Dropped about midway between us.

Q. After you fired upon these two natives did you look toward the dock?

A. Yes, I looked all around.

Q. On looking around at that time, how many natives did you see down toward the dock?

A. None.

Q. What natives, if any, after firing these shots did you point your piece at?

A. No other than these two.

Q. Why did you shoot these two natives?

A. Because they were trying to do me an injury—trying to assassinate me.

Q. Could recognize the knife if it were shown you, with which you state one of them had on that day?

A. Yes.

Q. Is this the knife [showing him Exhibit A]?

A. Yes.

Q. Did you consider yourself in danger of loss of your life at the time you fired this first shot?

A. Yes.

Q. Also, at the time you fired the second shot?

A. Yes.

Q. When you looked back, as you testified, how many feet did you go from your path of your post as it was walked at that time?

106 A. About fifteen or eighteen feet.

Q. Then you went about fifteen or eighteen feet away from the path of your post?

A. Yes.

Q. Why did you do that?

A. When I saw the native draw this knife and conceal it I was not going to walk upon the post because I felt sure he would do me an injury. I gave him the right of way, and if he intended to do me an injury he would leave the path he was walking down.

Q. Have you observed the bullet holes in the wall said to have been made by the bullets you fired?

A. Yes.

Q. In relation to that point and a line drawn perpendicular across the road, describe the location of the native at the time you fired.

A. The natives were on the east side of the line.

Q. And where were you at the time you fired the shot?

A. I was to the east of that line.

Q. And were you east or west of the two bodies?

A. A little east, toward Camp Jossman.

Q. After you fired the shots and until the arrival of Lieut. Harrell, how far did you move from the spot from which you fired the shots, if you moved at all?

A. If I moved, it was not over two or three paces in either direction.

Q. Why didn't you halt these two natives?

A. There is no orders for challenging in the daytime. That is a through path for natives to go through.

Q. You say there are no orders for halting in the daytime?

107 A. No.

Q. But you state they attacked you. When they advanced in their atack upon you, why didn't you halt them instead of firing?

A. There was no time for halting.

Q. What were your orders as sentry on post No. 1?

A. Orders were divided in two classes, special and general. General orders: Take charge of this post and all Government property; walk my post in a military manner, keeping constantly on the alert, observing everything at the docks and within hearing; repeat all calls of the post more distant from the guardhouse than my own; to

quit my post only when properly relieved; receive, transmit, and obey all orders from and allow myself to be relieved by the commanding officer of the day, an officer or noncommissioned officer of the guard only; to hold conversation with no one except in the discharge of my duty; in case of fire or disorder to give the alarm; allow no one to commit a nuisance in the vicinity of my post. In any case not covered by instructions call the corporal of the guard. At night, exercise the greatest vigilance between retreat and broad daylight, at times designated by the commanding officer, and challenge all persons seen on or near my post and allow no person to pass without the proper authority. Special orders: Post No. 1, extending from hydrant to coal pile in the daytime. From hydrant to coal pile at nighttime, and every thirty minutes around the two quartermaster buildings; to allow no property to be loaded on boats or touched, meddled, or handled in any way except by orders of the officer in charge or his assistant; allow no assemblage of natives upon reservation, other than the employees of the quarter-
108 master's department; allow no native boats to some alongside the pier at all. In case the quartermaster's boat was approaching, notify the corporal of the guard, who will send members of the guard to be at the landing in time to tie it up; natives passing through the reservation will be confined strictly to the road. Natives will not be allowed to take water from the hydrant. In case the telephone bell rings three times notify the corporal of the guard.

Q. How long have you been in the military service?

A. Four years.

Q. What regiment did you serve in before you joined the 12th Infantry?

A. The Ninth Infantry.

Q. Where?

A. One year in China and one year on the island of Samar.

Q. Have you those discharges with you?

A. No.

Q. Did you consider yourself in the execution of your duty when you fired the two shots?

A. Yes; I was in the execution of my duty.

Q. Had you ever seen before the natives whom you shot on July 24th?

A. No; not that I remember of.

Q. Did you know them by sight or name?

A. No.

Q. After the shots were fired and the natives fell to the ground, did they move from the spots where they fell prior to the arrival of Lt. Harrell?

A. No.

109 Q. What is this paper I show you?

A. My discharge.

Captain Nettles reads the discharge: "Army of the United States, to all whom it may concern: Know ye that Homer E. Grafton, private, Co. G, Ninth Regiment of Infantry, enlisted July 11, 1900,

has served three years, is hereby honorably discharged from the Army of the United States by reason of expiration of the term of enlistment. Said Homer E. Grafton was born in Clinton County, Illinois, and when enlisted was twenty-one years and five months old, five feet nine inches high, fair complexion, blue tint eyes, light-brown hair, and a farmer by occupation. Given under my hand at Madison Barracks, New York, July 10, 1903. Signed Charles Rebe, Colonel Ninth Infantry. Character excellent.

"C. R. Noise, captain, 12th Infantry, commanding Co. G. Military record: Previous service, completed three years of continuous service July 10, 1903. Noncommissioned officer, corporal from July 22, 1902, to February 16, 1903; reduced at his own request. Marksmanship, third class, 1902. Battlements and engagements, skirmishes and expeditions: First expedition to China; next expedition to Samar, P. I., 1900, to May 13, 1901. In engagements Basay and Balingiga, Samar, September 30, 1901. Engagement near Langara October 22, 1901. Remarks: Service honest and faithful.

"C. R. Nois, captain, Ninth Infantry, commanding Co. G,
110 United States Army, recruiting station, Springfield, Mo., July 23, 1903. Reenlisted by me this date for infantry. S'gn'd S. N. English, first lieut., Ara. Corps."

That's all.

Cross-examination by Mr. Ross:

Q. Wish you would state what particular acts you observed on the part of the natives around there that made you suspicious.

A. I noticed the natives leaving Buena Vista in boats. They would take away a number of women, and when the boat came back it would be loaded with men. The boat sailed toward Panay. I also noticed some three natives that had concealed bolos about them and a strange action among a majority of the natives that traveled about that day.

Q. Strange in what way?

A. Appearing shy or in passing made many glances toward us, especially when passing us on post.

Q. Is that all you remember? Is it not true that there was an excursion leaving Guimaras on that day on the steamer "Paul Revere," and many people were leaving on that account?

A. There was an excursion boat.

Q. Great many people were leaving on that, were they not?

A. Not that I noticed.

Q. How far were these two men from you when you first noticed them?

A. I was halfway between Lt. Harrell's quarters and the east end of the storehouse, and they came out halfway between the coal pile and the west end of the storehouse. I do not know how far that is.

111 Q. Did you at this moment notice anything about these men which aroused your suspicions as to their intentions?

A. No.

Q. Where were they when you first noticed the knife?

A. I was at the east corner of the storehouse, and they had arrived at the west corner, and one of them pulled a knife from his bosom.

Q. When you saw the man take the knife from his bosom and hold it in his hand, did you at that moment believe he intended to attack you with the knife?

A. Yes; I thought it strange enough not to go directly on my post.

Q. Take the knife and illustrate the position in which he held it when you first saw it just as he drew it.

A. (Defendant indicated position as requested.)

Q. Now, are you positively certain as to which one of these natives had the knife?

A. I do not know them by name.

Q. You have testified that the one who fell in the middle of the road, who was Florentino Castro, was the one who had the knife; now, are you sure about that?

A. Yes; I am perfectly sure.

Q. What distance was from him to you when he changed the position of the knife as you state?

A. Not more than seven or eight paces.

Q. Take the knife and show the court how he rushed at you and changed the position of the knife.

A. (Defendant indicates the position.)

Q. Was he running when you shot him?

A. Yes.

112 Q. At what distance was he from you at the moment when you fired?

A. About four paces.

Q. Did he drop right where you shot him?

A. Yes; practically.

Q. What was the other man doing at this time?

A. The other man followed right behind him on the run.

Q. Where was he when you shot him, what distance from you?

A. I do not know exactly [but indicated the distance about thirty-five feet].

Q. Was he coming towards you when you fired at him?

A. No.

Q. He jumped back toward the quartermaster's building, didn't he?

A. Yes.

Q. Before you fired?

A. Yes.

Q. Did he have any weapon?

A. Not that I saw.

Q. Show the court the position he was in when you fired, as you recall it.

A. He was crouching.

Q. Illustrate the position.
A. (Defendant shows the positions.)
Q. How long an interval was there between the two shots?
A. Time to load my magazine.
Q. Almost instantly?
A. There had to be a little space of time to work the magazine.

Q. You say that first he started running towards you a
113 little to the right and to the rear of the other man, who was rushing upon you with a knife?

A. Yes.
Q. When did he change his attitude and start the other way?
A. When I fired the first shot.
Q. I believe you said he had no weapon in his hand or on his person—the one that ran toward the warehouse?
A. I did not see any.
Q. Who was the first person to arrive upon the scene after the shooting?
A. Corporal Reiter; immediately behind him Lt. Harrell.
Q. The corporal was there before the lieutenant.
A. Yes.
Q. What was the distance from you to the man crouched against the wall at the time you fired?
A. Approximately twenty or twenty-five feet.
Q. Is it your custom to carry your rifle with the magazine loaded?
A. Not all the time.
Q. What was your practice after that ordinarily when on guard?
A. There were times I loaded my magazine on guard.
Q. Did your orders require you to carry your magazine loaded in the daytime?
A. No.
Q. On the contrary, were there not orders that you should not carry your piece loaded in the daytime?
A. There were no orders that they should or should not be loaded.

114 Mr. Ross. That's all.

Redirect examination by Captain NETTLES:

Q. How many seconds elapsed between the arrival of Corporal Reiter and Lt. Harrell?
A. Four or five.
Q. Captain NETTLES. That's all.

Private CHARLES A. FAVER, Co. G, 12th Infantry, witness for the defence, after being duly sworn, testified as follows:

Question by Captain NETTLES:

Q. Where were you on July 24th, 1904?
A. On guard.

Q. Where?

A. In the guardhouse, doing guard at the beach, at Buena Vista, Guimaras.

Q. Where this instance happened that Grafton is on trial for?

A. Yes.

Did you hear the shot?

A. Yes.

Q. How many were fired?

A. Two.

Q. What did you do when you heard the shot?

A. I took my gun and ran down where the shooting was.

Q. When you got there what did you see?

A. Two natives lying on the ground and a knife lying close behind the wounded man and the sentry.

Q. There were two natives lying on the ground?

A. Yes, sir.

115 Q. Where were those two bodies lying, in reference to the warehouse?

A. One in the middle of the road and the other about five paces away.

Q. Near which one of these natives was the knife found?

A. Near the one in the middle of the road.

Q. What did you do with the knife?

A. Picked it up and handed it to Corporal Reiter.

Q. How near did that knife lie to the man on the ground?

A. Between his knees and his feet.

Q. Did you notice a sheath for the knife?

A. No.

Q. Did he have a belt on?

A. No.

Q. That's all.

Captain NETTLES. I would like to offer in evidence a certified copy of the proceedings before military court for this offence. There is in evidence a certified copy of the judgment, but I would like to submit a certified copy of the proceedings.

Mr. Ross. I object to that. The only purpose to any part of the record could serve would be to prove he was tried by a military court and that is already in the record.

The COURT. I do not think the evidence taken there could be offered as proof in this court. I think under my understanding of it I will have to reject it. I do not mean to exclude that part that has already come to the knowledge under the other plea

116 that has already been received. This in addition to that contains the evidence taken before the court-martial and different in no other way.

Captain NETTLES. Defense rests.

SANTOS ESPINOSA, witness called for the Government, after being duly sworn, testified as follows:

Questions by Mr. MONTINOLA:

Q. Where were you on July 24th?
A. On the dock.
Q. How many shots did you hear?
A. Three.

Cross-examination by Lt. SHIELDS:

Q. Where were you when the shots were fired?
A. In my house, where I had gone to have my dinner at about two thirty.
Q. How far is your house from the dock?
A. Can not estimate it.
Q. In what barrio is your house situated?
A. Santa Rosario.
Q. How long would it take you to walk from the dock to your house?
A. I can not fix the time.
Q. When did you go to your house that day to get your dinner?
A. In went home and took a little rest and had my dinner at two thirty.
Q. How many minutes after you got home before you had
117 your dinner?
A. I do not know.
Q. Is it not a fact that it takes a half an hour to walk from the dock to your house?
A. No.
Q. Does it take fifteen minutes?
A. I do not know.
Q. Five minutes?
A. I do not know.
Q. Can you walk there in one month?
A. I can not estimate.
Q. How long have you lived in that house?
A. More than two years.
Q. And you were at your house when you heard the shot fired?
A. Yes; having my dinner.
Q. Who told you there were three shots fired?
A. I heard them myself.
Q. What did you do when you heard these shots fired?
A. I drank water and left my house.

Redirect examination by Mr. MONTINOLA:

Q. Can you fix from this door the distance from your house to the storehouse where these men were shot?
A. No; but my house is on a straight road from the storehouses. That's all.

MARTIN MULLER, witness for the Government, after being duly sworn, testified as follows:

I live in Iloilo, Calle Rosario, No. 18. Inspector for J. G. White & Co.

118 Questions by Mr. Ross:

Q. Where did you reside on July twenty-fourth of this year?

A. In Buena Vista, Guimeras.

Q. Were you there on that day?

A. I do not know whether it was that day.

Q. Were you there on the day the killing of the two natives?

A. Yes.

Q. What day of the week was that?

A. Sunday.

Q. How long had you resided there?

A. 1½ years.

Q. Did you notice anything suspicious on the part of the natives that day that would indicate there was going to be trouble?

A. Nothing out of the ordinary.

Q. Did you notice anything unusual in the conduct of the people?

A. No.

Q. Do you know if there was any occasion for a considerable number of people leaving the place that day?

A. Nothing more than the usual Sunday excursions and going to the cock pit.

Q. Have you ever served in the army in the Philippines?

A. Yes; two years.

Q. Actual service in the time of war?

A. Yes.

Mr. Ross. That's all.

SERGIO CONSING, municipal presidente of Buena Vista, called as a witness for the Government, and after being duly sworn, testified as follows:

Q. Where were you on July 24th, 1904, when this shooting occurred?

A. I did not hear the shots; therefore could not tell where I was.

Q. Did you have any information about what happened?

A. Yes; on or about three thirty that afternoon I received a
119 letter from the lieutenant of the barrio saying that two natives had been shot. This was on Sunday.

Q. Where were you on that day?

A. In the municipal building when I received the letter.

Q. In the town of Buena Vista?

A. Yes.

Q. Has anybody else told you about this event except what you learned from the letter of the lieutenant?

A. In the afternoon of the day I went to the barrio of Santa Rosario to obtain information as to what had happened. A person

by the name of Macario, also an employee of the quartermaster's, told me he had been with Ambrosio when this occurred.

Captain NETTLES. I object to the witness going ahead and relating his conversation.

The COURT. I suppose it competent for him to state that Macario gave him an account of the fact. Ask him if he did.

A. Yes.

Q. Is this the man [indicating Macario, a former witness]?

A. Yes.

Q. Who was present when he told you about this matter?

A. The vice-presidente, who was the man in charge of that district.

Cross-examination by Captain NETTLES:

Q. Do you know Captain Hutton of the 12th Infantry?

A. I know several captains, but not by name.

Q. Did you see the large captain that was here and testified this morning?

120 A. Yes.

Q. Do you know him?

A. Yes.

Q. Is it not a fact that Captain Hutton came to your house to get information concerning the killing of these two natives?

A. He came to inform me that this case was to be tried before a court-martial in Camp Jossman, and that any private citizen was authorized to assist at the trial, and told me that the public could come there and see that the military tribunal act impartial in the case, and he told me to present all the evidence that would clear up the matter. I told him that I, on my part, had no interest in the matter, as I was convinced that the American tribunal would act impartially in reference to the evidence. I told him that as the deceased had been laborers, their companions working with them could testify.

Q. Did not Captain Hutton ask you for the names of any witnesses to the act if you knew any?

A. I do not remember of his putting that question to me.

Q. Why did you not give him the name of Macario on that day?

A. I did not give any name, but I told him some of those laborers might know something about it.

Q Did you not tell Captain Hutton that you did not know the names of any of the witnesses to the act on that day?

A. No; he did not ask me.

Q. Why did you not present this witness before the general court-martial when you were advised that this man was to be tried?

Mr. Ross. Object, as question is immaterial.

121 (Question withdrawn.)

Q. Why did you not inform Captain Hutton of this witness and have this witness at the trial?

A. I did not think that captain came to my house for the purpose of getting information from me, but merely came there that I should notify the public that a hearing should take place.

Q. Did not Captain Hutton ask you specifically for the names of any witnesses to this affair?
A. No.
Mr. Ross. The Government has no more evidence.

Lieut. HARRELL recalled by Captain Nettles.
Q. Do you know the witness Santos?
A. Yes.
Q. Do you know where he lives?
A. Yes.
Q. How far is his house from the storehouse dock?
A. On a line six or seven hundred yards.
Q. Is it that far from the dock or from the storehouse?
A. From the storehouse.

Cross-examinaton by Mr. Ross:

Q. Is it not a fact that the report of the U. S. magazine could be heard at a distance of more than six or seven hundred yards?
A. Yes.
Q. A line from the storehouse to his house would cross the bay, wouldn't it?
A. Yes.
Case closed.

I certify that the foregoing pages from one to one hundred and twenty-four inclusive, to be a true and correct transcription of the notes taken by me in the case.

C. G. MURRAY,
Stenographer, Fifteenth Jud. Dist.

122 Afterwards, on the 11th day of December, 1904, the following decision was rendered by the Court of First Instance, to wit:

United States of America, Philippine Islands. Court of the First Instance, Province of Iloilo.

UNITED STATES
vs.
HOMER E. GRAFTON.

DECISION.

This is a complaint against Homer E. Grafton, a private in Company G, of the 12th United States Regiment of Infantry, for the crime of assassination, alleged to have been committed at Buena Vista, on the island of Guimeras, in the Philippine Islands, on the 24th day of July, 1904, by shooting and killing one Felix Villanueva, a native Filipino. The case came on for trial on the 2nd day of December, and occupied the time of the court during the 2nd, 6th, 7th, and 8th of December.

The defendant demurred to the complaint upon the ground that the court did not have jurisdiction to try the offense, and as an American citizen demanded the right of trial by jury, and pleaded in bar a former trial for this offense by a general court martial and an acquittal at said trial. All these defenses are referred to, and will be found stated at length in the general record of the case. All were overruled and denied by the court, and thereupon the defendant pleaded "not guilty" to the complaint and was placed on trial on the merits thereof on the said 6th day of December. Upon the trial the following facts were developed by the testimony and are found by the court:

The defendant is a private soldier in Company G of the 12th Regiment of Infantry in the United States Army. With his
123 regiment he was on duty at Camp Jossman, in the island of Guimeras, and had been there several months. Prior to the 24th day of July, 1904, a detachment numbering twenty-four men was detailed from said company, the defendant being among that number, to do guard duty upon a military reservation at Buena Vista, on said island. Said military reservation contains a highway, leading from the landing place at Buena Vista to Camp Jossman, and has been regularly reserved for military occupation under the provisions of the law governing such reservations, and was so occupied on and before the 24th day of July, 1904. On that day the defendant was detailed for guard duty, and was placed on post one, in the first relief of said guard, his hours of duty being from 8 o'clock in the morning to 10, and from 2 p. m. to 4 p. m. of said day. His post extended from a hydrant in front of the officers' quarters along said highway to a certain coal pile, situated at the end of said dock, a distance of about 140 yards. Upon said highway, at a distance of about 40 or 50 yards from said hydrant, the Government has two quartermasters' storehouses, one on each side of said highway, standing opposite each other, with a roadway passing between them about 40 feet in width. Among his duties was to guard said coal pile and said storehouses and their contents. The path along which sentries on said post were accustomed to travel ran from said hydrant along the southerly side of said highway to the easterly end of the storehouse on the southerly side of said highway, thence along said highway parallel with the southerly storehouse and between them, at a distance of 12 or 15 feet therefrom, to the westerly end of said storehouse, and thence along said highway to the coal pile. The public were permitted to use said highway without hindrance or
restriction by the military authorities, except natives were not
124 permitted to congregate therein, or loiter about said Government property, or commit any nuisance thereon, or any breach of peace. The detachment had been in performance of that duty for three or four days. The defendant had served with "excellent" record in the United States Army in the Philippine Islands for a term of more than four years, including a former enlistment. He is a native American, above medium stature, about 26 years of age, and

apparently of more than average strength and physical ability, and of good intelligence, and has been regarded by his officers as a steady, capable, and efficient soldier, not easily excited or thrown off his guard.

During the forenoon of the day in question some remarks had been made in his presence about the peculiar actions and appearances of the native population on that day, and he himself had observed a considerable number of natives, including women and children, embarking from that port, apparently going to the island of Panay, and had observed the return of several boats manned with men. Among that number he observed three on one occasion with bolos, who had gone into the woods upon a hill not far from his post, and had observed furtive glances by the natives toward the soldiers, and especially toward the sentry upon his post, and had apparently gotten into a somewhat nervous and apprehensive condition of mind. During the first turn upon his post, from 8 to 10 a. m., he carried his gun without being loaded, but when his second turn of duty arrived, in consequence of suspicions raised or some other reasons which do not appear, he loaded the magazine of his piece, which was a .30 calibre U. S. magazine rifle. While walking his post, and just before the occurrences which will be stated hereafter, he had called the attention of the corporal of the guard, in whose charge he was, to his suspicions, and stated to the corporal what he had seen and requested the corporal to report it to the commanding officer, saying if the corporal did not report it he himself would as soon as he was relieved.

I am satisfied upon all the evidence that these suspicions and fears were imaginary and that the evidences of them upon which he acted and formed his conclusions were not sufficient to justify the conclusions and beliefs that he in fact entertained; that the appearances which he observed were magnified in his own apprehension and were only such as are common and natural in that locality on that day of the week, it being Sunday; that the alleged suspicious circumstances and appearances were not sufficient to cause apprehension of any danger in the mind of a prudent and reasonable man of ordinary firmness and observation, acting reasonably and prudently, of any unusual danger, or to cause apprehensions of an attempted attack on the guard or attempted injury to the detachment or property in question in this case. However, I am satisfied that he entertained those nervous apprehensions and fears, and was suspicious that some attempt was brewing by the natives to massacre the guard, of which he was a member.

Shortly before 3 o'clock in the afternoon the defendant was walking his beat, going from the hydrant toward the dock along the path on the southerly side of the highway, easterly from the easterly end of the storehouse on the south side of the highway in question, when he saw approaching him two natives, one named Felix Villanueva, for whose murder he is now on trial, and the other named Florentino Castro. They were coming toward him from the westerly end

of the storehouse, about the same distance from the storehouse that he was and along the road in question and over the road which he would pass in walking his beat. Being suspicious and alarmed in the manner aforesaid, he watched their movements with con-
126 siderable jealousy. As he approached the easterly end of the storehouse and was near to it they came to the westerly end and at the rate both were going would meet about the middle of the storehouse, between the two, on the highway. Their path led along the path he would naturally follow. About that point he saw Florentino Castro, who was walking beside the deceased, take an ordinary sheath knife out of the bosom of his blouse and hold it in his hand, with the blade resting lengthwise of his arm upon his wrist. This excited his suspicions anew, and instead of following his path, as he ordinarily would, and without challenging or ordering any halt upon the part of the natives, he obliqued to the right, went across the road between the storehouses, and walked along to the westward, along the margin of the road, within a few feet of the northerly storehouse.

The foregoing facts are completely established by the evidence, some upon the testimony of the defendant alone, and are found by the court. From this point and as to the actual shooting there is a conflict in the testimony. The defendant is accused in another complaint in this court of the assassination of Florentino Castro, the companion of Felix Villanueva, on the same occasion. That case is not now on trial, and the evidence and facts found concerning the acts and death of said Castro are received in this case only for the purpose of explaining and so far as they relate to the death of Villanueva.

The defendant elected to testify in his own defense, and his own evidence from the point above stated was to the following effect:

That as he obliqued to the right from the corner of the storehouses, leaving his accustomed path and going towards the northerly side of the road, the two natives obliqued to the left in a line to meet him, leaving their natural course to their right until they came within 25 or 30 feet of him; that Florentino then changed the position of the knife in his hand, and, bringing the blade to the front, crouched
127 forward and made a dash at him, followed by the deceased, Felix Villanueva; that in consequence of said action and motion he deemed it necessary in defense of his own safety to fire upon Florentino, and that he threw a shell into the barrel of his rifle and fired at Florentino at a distance of about 15 feet; that Florentino immediately fell, and Felix, his companion, turned and ran in the direction of the storehouse on the southerly side of the highway; that the defendant immediately threw another shell into the barrel of the rifle and fired upon Felix while he was near the wall of the southerly storehouse as he could get and in a crouching attitude; that Felix fell back against the wall of the storehouse; that at the moment of firing he shouted for the guard; that within 20 seconds or such a matter several persons arrived; that he remained standing

practically in the same position he was in at the time of firing, thought he might have moved a yard or such a matter; that Florentino and Felix both remained where they fell, and he estimated the distance to Felix at 20 to 25 feet beyond Florentino; that at the moment of firing no one was in sight; that he did not see any other natives at the time of firing; that the knife carried by Florentino fell about midway between himself and where Florentino fell; that he did not fire but two shots; that Felix lay at the point where there are certain holes in the corrugated-iron wall of the storehouse; that he did not know either of said natives, or of any reason for them to have any resentment or desire of revenge toward him, and he had none toward them, and that he did not see any weapon in the possession of Felix.

It is for this shooting that the defendant is upon trial and the above version of the shooting is that sworn to by the defendant himself.

The testimony of the Government varied in some essential particulars from that of the respondent himself. The Govern-
128 ment's evidence tended to show that the two natives were boatmen in the employee of the quartermaster's department on the dock at Buena Vista; that they, in company with others, had been waiting during the day, expecting the arrival of the transport "Liscum;" that it not being sighted, they started for their dinner at about 3 o'clock; that their way led them along the road in question between the storehouses and past the officer's quarters; that as they passed the coal pile, before named, which is situated at the end of the dock on the right-hand side of the highway, going easterly and about 80 yards from the scene of the shooting, Felix had his sheath knife, which he as boatman was accustomed to carry, in his hand and was trimming his finger nails with it; that the two walked quietly, without any demonstration against the guard or anyone, along the highway, until they met the sentry at a point somewhat westerly from the point where the bullet holes were found in the wall of the storehouse; that the sentry was approaching from the east and as they advanced he went to the northerly side of the highway, and when they were within 20 or 25 feet from the sentry he covered Felix with his gun, aiming at him; that Felix turned to the right and went obliquely away from the defendant to the side of the storehouse and stooped down and attempted to pass, whereupon the defendant fired upon him, without hitting him; that he immediately fired the second shot, which took effect in his left shoulder, causing a wound from which he died almost immediately; that thereupon Florentino, who had stood practically still in his tracks after the pointing of the gun at them, attempted to run and retrace his steps, and the sentry fired upon him and he fell in his tracks, mortally wounded.

They support this claim by the testimony of Ambrosio Obidilla and Marcario Olbe, two native employees of the quartermas-
ter's department, who testified to being eyewitnesses of the
129 facts before stated and testify that three shots were fired and that the position of Florentino's body was such that it was im-

posible for the bullet that killed him to have made the mark in the storehouse at the point where Felix was killed, which is confessedly a bullet mark and made at the time of the shooting in question.

The defendant claimed that the testimony of Ambrosio Obidalla and Macario Olbe was a pure fabrication; that they were not eyewitnesses of the affair. I am satisfied and find they were eyewitnesses, and at the time at a distance of about 70 to 80 yards from Florentino and Felix; that Florentino and Felix were employees of the quartermaster's department on the dock at Buena Vista and had been waiting there during the day, expecting the arrival of the transport "Liscum," and that it not being sighted, they had started for their dinner at the time mentioned; that their way was along the roadway in question and between the storehouses and past the officers' quarters; that as they passed the coal pile, before named, which is situated at the end of the dock on the right-hand side of the highway going easterly, in a position claimed by the Government, Felix had his sheath knife, which he carried as a boatman, in his hand and was trimming his finger nails with it; that the two witnesses, Ambrosio Obidalla and Macario Olbe, also native employees of the quartermaster's department, saw them as they passed by and followed them a little distance toward the storehouse and saw the shooting at a distance of about 70 or 80 yards; that Florentino and Felix walked along quietly until they came near the westerly corner of the southerly storehouse and along the path between the storehouses, until they observed the sentry obliquing to the right, apparently to avoid meeting them; that when they saw this motion they themselves bore a little to the left to pass near the sentry; that the knife was
130 then in the possession of Florentino (I am not able to tell at what point it was changed from the hands of Felix to Florentino, but I am convinced that it was observed by the defendant at about the time Florentino and Felix reached the corner of the storehouse, and that Florentino carried it in his hand from that point); that when they reached a distance of about 18 to 20 feet from defendant the defendant fired upon Florentino, the bullet striking about one inch below the ribs on the right side, passing diagonally through the body, emerging on the left of the spinal column an inch below the point of entrance; that Florentino at the moment had the knife in his hand and fell in his tracks, the knife falling near where his feet were and remaining in that position until after the arrival of the officer of the guard and other witnesses and until removed; that at the moment of firing Felix turned to the right and ran pretty nearly in the direction of the shot to the storehouse on the southerly side of the road and a distance of 35 or 40 feet from the defendant, and being unable to continue his flight, crouched down against the wall. The defendant, as quickly as possible after firing upon Florentino, threw another cartridge into the barrel of his gun and immediately fired on Felix, the ball striking him at the point of the left shoulder, passing diagonally through his body, coming out upon the right side between the 5th and 6th ribs, killing him prac-

tically instantly, although he lived a few seconds; that he fell against the storehouse and remained in the position in which he fell until the arrival of other witnesses. I am satisfied that only two shots were fired, and that they were fired under the foregoing circumstances. I am not satisfied that the natives, Florentino and Felix, made the rush, running toward the defendant with the knife advanced and in a crouching attitude, as described by him, but I do not deem it necessary to affirmatively find to the contrary in order to dispose of this case. I am inclined to believe that some demonstra-
131 tion was made with the knife, and account for it in my mind upon the ground that the natives had observed the trepidation and nervousness of the defendant and that he had left his path to avoid them, and they advanced in the manner in which they did and made whatever demonstration they did because they thought he was afraid of them and with a spirit of sport and to see what action he would take, rather than with any intention on their part to assault him or use the knife upon him. It is absolutely incredible to me that these two natives, armed only with the knife in question, should have committed such an assault as the defendant claims, especially in view of the fact that he apparently surpassed either of them in physical strength and was armed with a much superior weapon and was in easy call of the reserve guard, while they were alone, no other natives being in the vicinity, and had in their possession no other arm except the knife in question. The cost of their action, whatever it was, and of the defendant's nervousness and excited condition, is the life of two Filipinos, but I am unable to believe and I find that they had no further design upon the defendant than perhaps to increase his nervous condition by frightening him a little by their action.

The marks of the two bullet holes are in the wall of the storehouse, which is of corrugated iron, at the point where Felix was shot. They are situated about 20 inches above the ground and nearly upon a level, and are from 1 to 1½ inches from each other, and are the marks of the two shots which defendant fired, as above stated. The direction of the shots was diagonally across the road from the northerly side of the road, from a point about 40 feet distant from the holes in the wall. The line of fire would practically cover the place where the body of Florentino lay to the point where the body
132 of Felix lay from the point where the sentry stood at the time of shooting, and corroborates his statement as to the distance where Florentino was when he fired upon him; Florentino's body lay in nearly the middle of the road a little to the east of the bullet marks. Felix's body lay, as before stated, at the point where the bullet marks are, and the position of the sentry at the time of firing was somewhat east from the point where Florentino was shot.

Without attempting to discuss the defendant's justification for firing the first shot, I believe and find that the second shot, by which Felix was slain, was unjustifiable and unlawful, in consideration of

all the facts in the case. If an attack was made by Felix, it had been abandoned before he was shot. He had ran as far as possible in an opposite direction from the defendant. He had crouched by the side of the wall not in an belligerent position, but rather in one of supplication and submission. He was unarmed; his companion was down and there were no other companions of his or natives within sight of the sentry. The guard and most of the detachment and officers were within 50 to 75 yards from the sentry, to his own knowledge. The sentry was possessed with a loaded rifle, with which, if any new demonstration was made against him by Felix, he could have successfully defended himself. Felix, as before stated, was at a distance of about 40 feet from him, and shooting him under those circumstances was not necessary for the defendant's protection or for the protection of the property of the Government, or in discharge of defendant's duties, nor would such shooting, under the circumstances, appear necessary to a man of ordinary intelligence, firmness, and reason as a necessary defense of his life or safety.

He does not come within any of the circumstances which exempt him from criminal liability under the provisions of chapter 2 133 of article 8 of the Penal Code, then and now in force in these islands. There is no extenuating circumstances, except such as have already been stated in the foregoing statement of facts. I think, under the provisions of article 9, the extenuating circumstances mentioned in sec. 7, to a considerable extent, existed, and the defendant at the moment of firing the shots was in a state of great mental excitement, and that in firing the second shot he acted without consideration of the circumstances which have been related that insured his safety from injury by Felix; that he acted without premeditation—that is, without deliberate premeditation—and there is not any circumstance other than already stated to show that he acted with treachery.

Accordingly upon the foregoing facts, the defendant is by the court adjudged and declared guilty of an infraction of article 404 of said Penal Code, and of the crime of homicide, in killing the said Felix Villanueva, at the time and place and in the manner hereinbefore stated, and in view of the extenuating circumstances before remarked upon, he is sentenced by the court to imprisonment in such prison as the law directs, for the term of twelve years and one day, it being the minimum term of the minimum degree of reclusion temporal, which is the penalty for homicide, and to pay the costs of the prosecution, and to suffer all the other accessories of said sentence.

HENRY C. BATES,
Judge of the Court of the First Instance,
9th Judicial District.

ILOILO, *Dec. 11th, 1904.*

Thereafter on the 16th day of December, 1904, the following notice of appeal was duly served by the defendant, to wit:

United States of America, Philippine Islands. Court of the First Instance, Province of Iloilo.

UNITED STATES
vs.
HOMER E. GRAFTON.

NOTICE OF APPEAL.

134 The defendant above mentioned, Private Homer E. Grafton, Company G, 12th United States Regiment of Infantry, appeals to the Supreme Court of the Philippine Islands from the decision made in the above-entitled cause by his honor Judge Henry C. Bates, judge of the Court of First Instance, Ninth Judicial District, and filed at Iloilo December 11th, 1904.

CLARENCE S. NETTLES,
Capt. & Actg. Judge-Advocate, U. S. A.,
Attorney for the defendant.

DECEMBER 16th, 1904.

Received to-day, the 16th of December, 1904.

RUPERTO MONTINOLA,
Provincial Fiscal.

135 The assignment of errors contained in the judgment of the Court of First Instance for the Province of Iloilo, Philippine Islands, as presented to the Supreme Court of the Philippine Islands, was as follows:

UNITED STATES, APPELLEE,
vs.
HOMER E. GRAFTON, DEFENDANT-APPELLANT.

ASSIGNMENT OF ERROR.

I. The court erred in overruling the demurrer and denial of jurisdiction by the defendant, for that:

(a) The Court of First Instance has no jurisdiction over offenses committed by officers or enlisted men of the United States Army within the limits of a military reservation of the United States.

(b) The Court of First Instance is without jurisdiction to try a soldier of the United States for an act done in the performance of his military duty imposed under the Constitution and laws of the United States.

(c) The defendant was entitled, under the Constitution of the United States, to trial by a jury of his peers.

(d) The indictment charging the defendant with assassination was not found or presented by a grand jury, as provided for by article 5 of the amendment to the Constitution of the United States.

II. The court erred in overruling the plea in bar of defendant for that, having been tried and acquitted of the identical homicide by a court of competent jurisdiction, the defendant could not be legally a second time placed in jeopardy of punishment for the same offense.

III. The court erred in finding:

(a) "I am satisfied upon all the evidence that these suspicions and fears were imaginary, and that the evidence of them, upon which he acted and formed his conclusions, were not sufficient to justify the conclusions and beliefs that he in fact entertained; that the appearances which he observed were magnified in his own apprehension, and were only such as are common and natural in the locality on that day of the week, it being Sunday; that the alleged suspicious
136 circumstances and appearances were not sufficient to cause apprehension of any danger in the mind of a prudent and reasonable man of ordinary firmness and observation, acting reasonably and prudently, of any unusual danger, or to cause apprehension of any attempted attack upon the guard, or attempted injury to the detachment, or property in question in this case."

(b) That the natives, Ambrosio Obidalla and Macario Olbe, were eyewitnesses to the homicide.

(c) That the two deceased natives "had no further design upon the defendant than perhaps to increase his nervous condition by frightening him a little by their action."

(d) "That the second shot, by which Felix was slain, was unjustifiable and unlawful in consideration of all the facts of the case."

(e) That the shooting, under the circumstances, was not necessary for the defendant's protection of the property of the Government or in the discharge of defendant's duties, nor would such shooting, under the circumstances, appear necessary to a man of ordinary intelligence, firmness, and reason as a necessary defence of his life or safety.

(f) The defendant "does not come within any of the circumstances which exempt him from criminal liability under the provisions of chapter 2, art. 3, of the Penal Code."

The court erred in adjudging and declaring the defendant guilty of an infraction of art. 404 of the Penal Code, and of the crime of homicide, in killing Felix Villanueva, and imposing the sentence, "imprisonment in such prison as the law directs for the term of twelve years and one day, and to pay the cost of the prosecution, and to suffer all the other accessories of said sentence."

CLARENCE S. NETTLES,
Captain and Acting Judge-Advocate, U. S. Army,
Attorney for Defendant-Appellant.

Therefore, to wit, on January 24, 1905, the cause was duly transmitted to the Supreme Court of the Philippine Islands, as per the following letter of transmittal:

137 THE COURT OF FIRST INSTANCE,
NINTH JUDICIAL DISTRICT,
Iloilo, January 24, 1905.

The Clerk of the Supreme Court, Philippine Islands, Manila, P. I.

SIR: I have the honor to transmit the attached case No. 248 of the year 1904 against Homer E. Grafton, for murder and the sentence dictated in said case by virtue of the appeal interposed by defendant's attorney from the judgment rendered in the said cause.

Very respectfully,

LOUIS CORTES,
Clerk of the Court of First Instance of Iloilo.

Filed with the clerk of the Supreme Court January 26th, 1905.

Argued August 10th, 1905. Reargued January 25, 1906.

Decision was rendered April 3rd, 1906, and final judgment entered April 14, 1906.

The decision of the majority of the court and the dissenting opinion of the minority are as follows:

United States of America. In the supreme court of the Philippine Islands.

THE UNITED STATES
vs.
HOMER E. GRAFTON. } No. 2400.

TRACEY, J.

138 The defendant charged with the crime of assassination was convicted of homicide and sentenced to a term of imprisonment of twelve years and one day. He was a private in the United States Army, and when on guard at a military reservation at Camp Jossman, Guimiras, shot and killed two Filipinos, Florentino Castro and Felix Villanueva. For this offence he was tried by court-martial and acquitted, but thereafter was prosecuted by the people in the present action for the death of Felix Villanueva.

The first inquiry is, "Was the shooting justified?" It occurred on Sunday afternoon, July 24th, 1904, between two and three o'clock; the deceased were both employed as boatmen in the U. S. quartermaster's department and were at the time in a road used as a public thoroughfare which the sentry was patrolling.

The defendant's testimony is as follows:

"I was at the east end of my post about starting to the west post. I arrived at about half way between Lieutenant Harrell's quarters and the storehouse. Two natives came on my post about half way between the storehouse and the coal pile on the left. They had

climbed over the stone wall and passed over my post. They advanced directly towards my post. When I arrived at the corner of the storehouse they were about the corner of the same storehouse at the other end. Just as I started to cross those stones, a native reached in his bosom and pulled out a knife and immediately he changed the handle and concealed the knife under his arm from my view. Upon seeing that, I looked back toward the building on the right on the road coming towards the dock and upon getting near the building they had arrived at a place to my left. Upon gaining this position, the native turned the knife with the point towards me and made a rush at me. At the same time the other native followed close to him. At the time he did this I brought my piece to my shoulder, threw a cartridge in the magazine and fired at him. The other native jumped back towards the quartermaster building. I loaded
139 my rifle and fired at him. Immediately after firing at the second native I hollowed for the guard. As soon as I hollowed for the guard I looked in the direction the guard was coming from."

On being interrogated by his counsel, he further testified that as the native approached him he had left his path immediately before the shooting and walked from fifteen to eighteen feet away towards the southerly storehouse.

Upon cross-examination he testified, putting his testimony into narrative form:

"Florentino was running when I shot him and was distant from me when I fired about four paces; he dropped practically right where I shot him; the other man followed right behind him on the run; I don't know exactly where he was when I shot him, but the distance was about [indicating about 35 feet]. He was not coming towards me when I fired; he jumped back towards the quartermaster building before I fired; he had no weapon that I saw; he was crouching; there was an interval between the two shots, time to load my magazine; there had to be a little space of time to work the magazine; first he started running towards me, a little to the right and to the rear of the other man who was rushing upon me with a knife; he changed his attitude and started the other way when I fired the first shot; I did not see any weapon in his hand or on his person."

He further testified that on looking around he saw no other native than the two upon whom he fired; that he shot them because they were trying to do him injury; that he considered his life in danger; that he fired but two shots, and that neither of the natives moved from the spot where they fell prior to the arrival of Lieutenant Harrell, who came almost immediately after the shooting.

Lieutenant Harrell, the commanding officer of the defendant, who saw the bodies where they fell, measured the distance and made a memorandum about forty-five minutes after the shooting,
140 swore that the body of Florentino Castro lay ten and a half feet from Private Grafton, and that of Felix Villanueva thirty feet from Florentino; that the distance from the defendant to

the wall where Felix Villanueva lay was forty-five feet, and that the centers of the two bullet holes in the wall above the body of Felix Villanueva were about three and a half inches apart.

On several points the defendant's testimony was disputed by Government witnesses, chiefly by two Filipino laborers employed in the quartermaster department at Guimiras, who swore that they saw the occurrence from the road near the coal pile; that the knife was carried by Felix, not by Florentino, and that he was trimming his nails with it; that he left the road only after the soldier pointed his rifle at him; that three shots were fired, two of them at Felix, who dropped first. The knife which is before the court is of the kind commonly carried by boatmen and is ten inches long, including the handle.

This testimony was contradicted by the position of the knife, which lay between the sentry and Florentino and by the many military witnesses, who united in saying that they heard only two shots. As to the number of shots it is supported not only by a third witness, but also by the singular fact that the two bullet holes in the storehouse wall near enough together to be covered by the palm of a hand, were both immediately above the body of Felix, a result scarcely conceivable had one of them first passed through the body of Florentino, where he is reported to have stood. As to the knife, they may have been in error in regard to the person carrying it, or it may have changed hands (as inferred by the learned trial justice) while the men came along the road. In other respects their testimony is not uncorroborated, and if given full credence would lead to the conviction of the defendant. We shall, however,
141 for the purpose of this judgment, accept the defendant's version of the facts.

A soldier guarding the property of the Government and the lives of his comrades can not be held to a too rigid accountability if he acts in the honest exercise of his judgment and with reasonable regard to human life. The defendant was proved to be a man of good character, of intelligence, and of sound judgment. This shooting occurred in the time of peace; there was no insurrection or disorder; the day was Sunday; the movements of the natives, not unusual on that day of the week, had aroused the suspicion of the defendant, who, being a newcomer, was unfamiliar with them, and he reported them to his superior officer. This had worked upon his fears and nerves. He had sometime before seen the bodies of some soldiers who had been surprised and killed, and the remembrance of that scene helped to unfit him to judge calmly the events before him. In these circumstances his leaving the path in order to avoid these natives was an act of prudence, and when the first native, Florentino Castro, holding a knife in his hand, approached the sentry, it was allowable for him to anticipate an attack and to defend himself as he did. This may be conceded, even though we do not accept the defendant's statement that the native was making a rush upon him pointing the knife at him, particulars in which he is apparently con-

tradicted by the probabilities of the case, as well as by the native witnesses. In any case, Florentino must have known that in going out of his way to approach an armed sentry on duty, whether in threat or in sport, he was taking his risk, and the sentry can not be punished for acting upon his own construction of that movement.

It is not, however, for the killing of this native that he was tried, but for that of Felix Villanueva, who was following his com-
142 rade. The defendant's own testimony makes it plain that the interval between the shots was long enough not only to enable him to throw a new cartridge from the magazine of his rifle into the barrel and to suffer Felix to reverse his career and run back a distance of about twenty-five feet and crouch down, but also to permit the defendant to observe these things.

In our judgment the observation by the defendant that the native, instead of advancing upon him, was fleeing from him and was protecting himself in a crouching attitude against the wall, was sufficient to apprize him that there was no danger and to deprive him of any justification for the shooting. The sacredness of Government property or of the life of the soldier is not greater than that of the life of a citizen, and a sentry with a loaded rifle in his hand, in the full possession of his senses, is bound to use reasonable judgment and is accountable for human life taken by him without the justification of immediate defence of himself or of his charge. The great trust conferred upon him is the measure of his high responsibility, and he may not act without forethought in the heat of strife. This soldier, observing that Felix had fled from him and had reached a point where flight was no longer possible, should have been conscious that he was in no bodily danger and he should not have fired the second shot.

The defendant sets up several defences upon the law, the first being the defence of twice in jeopardy. Immediately after the shooting and before the death of Florentino Castro, the civil justice, when seeking to take his dying statement, was warned by the officer in command "to keep out of it;" that he was on a military reservation and he would have to leave the things to the officer, and if he did not he would be put off or into the guardhouse. Later on, however, before holding the court-martial, the department commander offered to submit the case to the Court of First Instance of the islands. It does not appear what action the judge of that court took thereupon.
143 The court-martial proceeded and was terminated by the acquittal of the accused, and that acquittal is pleaded in bar.

Applying to these islands the principle of the 5th amendment to the Constitution of the United States Congress enacted on July 1st, 1902, "The Philippine bill," which provides:

"And no person for the same offence shall twice be put in jeopardy of punishment." (Section 5.)

In the Collie case, December 12, 1903, and the Tubig case, January 24, 1904, this court has decided that trial by United States Army court-martial in time of war or insurrection is a bar to an after

prosecution by this Government for the same offence, holding that the qualification of the doctrine of jeopardy found in the dual sovereignty of the several States and of the General Government has no place here, inasmuch as both governments, civil and military, derive their being and powers from the one sovereign, the United States. In these decisions, however, the doctrine is expressly limited to courts-martial held in time of war. Does it apply to those held in time of peace? The matter is governed by the 62nd Article of War, which reads as follows:

"ARTICLE 62. All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general or a regimental garrison, or field officers' court-martial, according to the nature and degree of the offence, and punished at the discretion of such court."

It differs from article 58, applying to cases of war, which expressly punishes murder, and under which the jurisdiction of these tribunals has been held to be exclusive. The construction of the 62nd article has not been settled. It has been contended on the one hand
that the constitutional provision in aid of liberty and for the
144 security of the citizen should be given the broadest construction, and that no prosecution should be twice had by the same sovereign for the same offence; that, having a right to select the tribunal, his selection should be final, and he should abide by the result, and it is argued that this fundamental principle will be nullified if cumulative proceedings are allowed. In favor of this construction stand the provisions of the 59th Article of War directing that an officer or soldier accused of a crime punishable by the laws of the land shall be turned over upon application to a civil magistrate.

It has been said by a text writer on the authority of cases which he cites:

"If the court in which the defendant was formerly prosecuted was legally constituted and had jurisdiction it makes no difference what the court was. The former jeopardy will bar a subsequent prosecution by the same sovereign in any tribunal whatever.

"When two separate courts of the same sovereign have concurrent jurisdiction of the same offence, the one which first rightfully assumes jurisdiction acquires control to the exclusion of the other." (Clark's Criminal Procedure, 388.)

The circumstance that the civil trial was for murder, a crime of which courts-martial in time of peace have no jurisdiction, while the prior military trial was for manslaughter only, does not defeat the defense on this theory. The identity of the offences is determined, not by their grade, but by their nature. One crime may be a constituent part of the other. The criterion is, Does the result of the first prosecution negative the facts charged in the second? It is

apparent that it does. The acquittal of the defendant of the charge of manslaughter pronounces him guiltless of facts necessary to constitute murder and admits the plea of jeopardy.

On the other hand, the great preponderance of text writers of judicial dicta and the reported opinions of Attorneys-General of the United States concur in regarding the same criminal act in its relation to the civil law and to the military law as constituting two distinct offences, the one being contrary to a criminal statute, and the other to military regulations, and therefore a mere breach of discipline. It is urged that this construction is required, both in the interest of civil law and military discipline, neither of which necessarily interferes with the other. In this view, the military sentence is not the punishment of a civil crime, but only the enforcement of military order.

In the case of United States v. Clark (31 Federal Reporter, 710), an escaping military prisoner, who was a soldier, was shot upon a military reservation in a time of peace. The military court of inquiry had acquitted the prisoner of blame. Judge Brown, presiding at the circuit, directed the discharge of the prisoner on the merits, but in reaching his conclusion, refusing to be bound by the holding of the military court, said:

"If the civil courts have jurisdiction of murder notwithstanding the concurrent jurisdiction by court-martial of military offences, it follows logically that the proceedings in one can not be pleaded as a bar to proceedings in the other, and if the finding of such court should conflict with the well-recognized principle of civil law, I should be compelled to disregard it."

In Cashiels case, Federal cases, No. 14744, the district judge appears to have been of the same opinion.

In Ex parte Mason (105 U. S., 699), the Supreme Court, considering the jurisdiction of a court-martial to try a soldier who when on duty had assaulted a citizen prisoner, waived this question, saying:

"Whether after trial by court-martial he can again be tried in the civil courts is a question we need not now consider."

Thus the question is left open by that tribunal. We favor
146 the construction long acted upon by both military and civil courts, that conviction of a civil crime does not bar military punishment for the same act in its character as a breach of discipline, that the rule applies conversely, and that trial in neither jurisdiction is a bar to proceedings in the other. The defence of double jeopardy is therefore overruled.

The defendant sets up as additional defences that the insular courts had no jurisdiction, for the reason that the offence was committed upon a military reservation of the United States; that having been committed by a soldier of the United States in the performance of his duty, it was not cognizable by the said courts, which can not be regarded as "United States courts;" and that the right of trial by

jury, while denied to American citizens voluntarily in these islands, is preserved to soldiers coming here under orders. We do not consider the discussion of these points necessary, for the reason that they appear to be judicially settled.

The sentence of the lower court is hereby affirmed.

JAMES F. TRACEY.

We concur:

C. S. ARELLANO.
FLORENTINO TORRES.
VICTORINO MAPA.

147 WILLARD, J.

The sentry voluntarily left the path beside the road to avoid a meeting with the two men, Castro and Villanueva. There was no occasion for their leaving the path and advancing towards him. That Castro did this with an open knife in his hand is conclusively proved by the fact that the knife and his body were found in the middle of the road. As to him, the case is brought fully within the provisions of article 8, paragraph 4, of the Penal Code, and the sentry is relieved from responsibility for his death.

That Villanueva participated in the wrongful aggression must, I think, be accepted as true. As to him, two of the requisites of article 8, paragraph 4, are proved, viz, an unlawful aggression and the absence of previous provocation. The question is whether the third requisite was also proved, viz, reasonable necessity for the means employed to repel the aggression.

The time elapsing between the firing of the first and second shot does not appear, but it seems to me from the testimony of Grafton quoted in the opinion that it could not in any event have exceeded five seconds. Looking at the case now, after a lapse of nearly two years, we can see that the killing of Villanueva was not necessary, and that Grafton committed an error of judgment in firing the second shot; but the case must be determined not by the way it now presents itself to us, but as it presented itself to Grafton, upon whom an unlawful aggression was being made by the two men, acting together. In repelling that aggression he performed two acts within five seconds of each other. Relieved from the responsibility for the first act, to hold him responsible for the second is to require of him the same serenity of mind in the excitement and stress of action as in the repose of consultation and reflection. In the case of the
148 United States v. Juan Salandanan (1 Phil. Rep., 478), this court said:

"We can not require a man who finds himself so forcibly and persistently attacked as was the accused to retain the presence of mind necessary to pick and choose and employ some other less violent means, more especially when we remember the natural rapidity with which the defense must necessarily be made if it is to produce the effect of repelling the aggressor."

See also the case of the United States v. Bernardo Patala (2 Phil. Rep., 752).

I think that the judgment should be reversed and the defendant acquitted.

CHARLES A. WILLARD.

We concur:

E. FINLEY JOHNSON.

A. C. CARSON.

149 Thereafter, on April 17, 1906, the following petition for writ of error and assignment of errors were filed by the plaintiff in error, to wit:

United States of America, Philippine Islands. In the Supreme Court of the Philippine Islands.

No. 2400.

HOMER E. GRAFTON, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES, DEFENDANT IN ERROR. } At law.

PETITION FOR WRIT OF ERROR.

And now comes Homer E. Grafton, plaintiff herein, and says that on or about the 14th day of April, 1906, the Supreme Court of the Philippine Islands entered a judgment herein in favor of the defendant and against this plaintiff, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

CLARENCE S. NETTLES,
Captain and Acting Judge-Advocate, United States Army,
Attorney for the Plaintiff.

Filed in the clerk's office of the Supreme Court of the Philippine Islands this 17th day of April, 1906, 11.30 a. m.

J. E. BLANCO, *Clerk.*

150 United States of America, Philippine Islands. In the Supreme Court of the Philippine Islands.

No. 2400.

HOMER E. GRAFTON, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES, DEFENDANT IN ERROR. } At law.

The defendant in this action, in connection with his petition for a writ of error, makes the following assignments of error, which he avers occurred upon the trial of this case, to wit:

I.

The court erred in holding that the defendant had not been twice put in jeopardy of punishment for the same offense.

II.

The court erred in holding that the defendant, through an enlisted man of the Army of the United States, and being at the time of the alleged offense in the Philippine Islands by virtue of military orders, could be tried by the civil courts of the Philippine Islands without a jury, notwithstanding the guaranties provided by section 2, Article III, and Articles V and VI of the amendments to the Constitution of the United States of America.

151 III.

The court erred in holding that the civil courts of the Philippine Islands have jurisdiction to try a soldier of the United States for an act done in the performance of military duty imposed under the Constitution and laws of the United States.

IV.

The court erred in holding that the act of the defendant, committed without malice and in the honest and reasonable belief that he was performing his duty, constituted an infraction of article 404 of the Penal Code of the Philippine Islands, and the crime of homicide.

CLARENCE S. NETTLES,
Captain, Acting Judge-Advocate,
United States Army,
Attorney for Plaintiff in Error.

Filed in the clerk's office of the Supreme Court of the Philippine Islands this 17th day of April, 1906, 11:30 a. m.

J. E. BLANCO, *Clerk.*

Thereafter, on the 17th day of April, 1906, the following orders were made, to wit:

No. 2400.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the Supreme Court of the Philippine Islands, greeting:

152 Because in the records and proceedings, and also in the rendition of the judgment of a plea which is now depending in said Supreme Court of the Philippine Islands, before you, between the United States of America, plaintiff, and Homer E. Grafton, defendant, a manifest error has happened, to the great damage of the said Homer E. Grafton, as by his complaint appears. We, being willing that the error, if any has been, should be duly corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the 15th day of August next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the seventeenth day of April, in the year of our Lord one thousand nine hundred and six, and of the independence of the United States of America one hundred and twenty-nine.

Allowed by:

JAMES F. TRACEY,
J. S. C., P. I.

[SEAL, S. C.]

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

153 United States of America, Philippine Islands. In the Supreme Court of the Philippine Islands.

No. 2400.

HOMER E. GRAFTON, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES, DEFENDANT IN ERROR. } At law.

ORDER.

This seventeenth day of April, 1906, comes the plaintiff in error by his attorney and files herein and presents to the court his peti-

tion, praying for the allowance of a writ of error, and an assignment of errors intended to be used by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof the court does allow the writ of error, which shall act as a supersedeas.

JAMES F. TRACEY,
Associate Justice of the Supreme Court of the Philippine Islands.

154 No. 2400.

THE UNITED STATES OF AMERICA, *ss:*

To Lebbeus R. Wilfley, esquire, Attorney-General of the Philippine Islands, greeting:

Your are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, on the 15th day of August, 1906, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Philippine Islands, wherein Homer E. Grafton is plaintiff and the United States is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand at the city of Manila, Philippine Islands, in the year of our Lord one thousand nine hundred and six, the seventeenth day of April.

JAMES F. TRACEY,
Associate Justice of the Supreme Court of the Philippine Islands.

Receipt of the foregoing citation is hereby acknowledged.

L. R. WILFLEY,
Attorney-General for the Philippine Islands.

Manila, P. I., April 17th, 1906.

155 United States of America. In the Supreme Court of the Philippine Islands.

HOMER E. GRAFTON, PLAINTIFF IN ERROR,
against
THE UNITED STATES, DEFENDANT IN ERROR. } No. 2400.

I, H. D. McGeorge, deputy clerk of the Supreme Court of the Philippine Islands, in charge, do hereby certify that the foregoing is a true and complete transcript of the records and proceedings had

in the above-entitled cause, and pursuant to an order of the honorable James F. Tracey, associate justice of this court, entered the seventeenth day of April, 1906, allowing a writ of error from the Supreme Court of the United States to the Supreme Court of the Philippine Islands, the same is transmitted herewith.

[SEAL.] H. D. McGEORGE,
Deputy Clerk Supreme Court P. I., In Charge.

(Indorsement on cover:) File No. 20323. Philippine Islands Supreme Court. Term No. 358. Homer E. Grafton, plaintiff in error, vs. The United States. Filed August 3, 1906. File No. 20323.

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